Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal statute provides that any obligation containing a gold clause can be discharged on payment of whatever tender is legal at the time of payment. An amendment, 31 U.S.C. § 5118(d)(2), declares that this provision "does not apply to an obligation issued after October 27, 1977." In this case, a post-1977 indenture assumed a pre-1977 obligation containing a gold clause. The question is:

Is a post-1977 assumption an "obligation issued" after 1977 in which a gold clause is enforceable, as held by the Eighth Circuit in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (1996), or the transfer of an existing, pre-1977 obligation in which a gold clause is not enforceable, as held by the Ninth Circuit in this case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Guy D. Adams, Herb Bailey, Barnts Medical Specialties, Benefit Trust Life Insurance Co., Tom Bradley, Donald L. Brookhart, Central Life Assurance Co., Russell L. Clarke, D.M.N. Inc., Ray Eiford, A. Sherman Hill, Bryce A. James, Frank L. Jones, Alan Russell Kahn, Robert M. Keenholts, the Manhattan Life Insurance Co., Standard Insurance Co., Ellis R. Stanley, Trustmark Life Insurance Co., the Union Central Life Insurance Co., Irene E. Walters, Woodmen of the World Life Insurance Society, and John H. Zybura, for their own behalf and on behalf of and as Class Representatives of all other persons similarly situated, were the plaintiffs-appellants in the Court of Appeals. CSX Transportation, Inc. was the defendant-appellee.

Pursuant to Rule 29.6, petitioners note that Benefit Trust Life Insurance Co., Central Life Assurance Co., D.M.N. Inc., the Manhattan Life Insurance Co., Standard Insurance Co., and the Union Central Life Insurance Co. have no parent companies and no non-wholly owned subsidiaries. Petitioner Trustmark Life Insurance Co. is a wholly owned subsidiary of Trustmark Insurance Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT HOLDING THAT THE ASSUMPTION OF PRE-EXISTING RIGHTS AND DUTIES MAY CONSTITUTE THE ISSUANCE OF A NEW OBLIGATION UNDER 31 U.S.C. § 5118(d)(2).	7
II. THE CONCLUSION BELOW THAT AN ASSUMPTION OF ANOTHER CORPORATION'S DUTIES UNDER A BOND CAN NEVER CONSTITUTE AN OBLIGATION ISSUED AFTER 1977 CONFLICTS WITH THE STATUTE AND THIS COURT'S PRECEDENTS.	10
CONCLUSION	16

TABLE OF CONTENTS -- Continued

Page

APPENDICES

Appendix A: Opinion of the Court of Appeals, dated April 10, 1996 ..... 1a

Appendix B: Order of the District Court, dated June 1, 1996 ..... 16a

Appendix C: Order of the Court of Appeals denying petition for rehearing and suggestion for rehearing *en banc*, dated June 24, 1996 ..... 23a

Appendix D: Order signed by Circuit Justice O'Connor extending the time within which to file petition for certiorari, dated September 11, 1996 ..... 25a

Appendix E: Pertinent Provisions of the Hocking Valley Railway Company First Consolidated Mortgage 26a

Appendix F: CSX Transportation, Inc., Supplemental Indenture 28a

TABLE OF AUTHORITIES

Page

Cases

Adams v. *Burlington N. R.R. Co.*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51) 6

Chesapeake & Ohio Ry. Co. Acquisition, 162 I.C.C. 323 (1930) 3

Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948) 9

Edwards v. *Kearzey*, 96 U.S. (6 Otto) 595 (1878) 11

EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 12

Fay Corp. v. *BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp.* v. *Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990) 8, 15

Guaranty Trust Co. of New York v. *Henwood*, 307 U.S. 247 (1939) 4, 14

Holyoke Water Power Co. v. *American Writing Paper Co.*, 300 U.S. 324 (1937) 4, 14, 15

National R.R. Passenger Corp. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985) 13

Norman v. *Baltimore & O. R. Co.*, 294 U.S. 240 (1935) 3, 4, 10, 14

Nortz v. *United States*, 294 U.S. 317 (1935) 14

Perry v. *United States*, 294 U.S. 330 (1935) 14

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 466 U.S. 243 (1984) 3

Trostel v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996) 7, 8

Wells Fargo Bank v. *Bank of America*, 32 Cal. App. 4th 424, 38 Cal. Rptr. 2d 521 (1995) 8, 11, 12

TABLE OF AUTHORITIES -- Continued

Page

Statutory Provisions

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

31 U.S.C. § 5118(d)(2) ..... *passim*

Pub. L. No. 104-208 ..... 2, 12

Pub. L. No. 95-147, 91 Stat. 1227 (1977) 4

Pub. L. No. 97-258, 96 Stat. 979 (1982) 4

Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112 ..... 4, 13, 14

Congressional Materials

123 Cong. Rec. 634-635 (1977) 4

H.R. Rep. No. 651, 97th Cong., 2d Sess. (1982) 4

Other Authorities

Black's Law Dictionary 1469 (6th ed. 1990) 9

Brief for the United States and the Reconstruction Finance Corporation, *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935) (Nos. 471, 472) ... 10

Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504 (1984) 4, 10

The Gold Bonanza That's Up to the Courts, Business Week, Jan. 12, 1976, at 66 ..... 9, 10

John Hanna, *Currency Control and Private Property*, 33 Colum. L. Rev. 617 (1933) 10

Michael Kolbenschlag, *Turning Paper into Gold*, Forbes, Mar. 3, 1980, at 88 10

Floyd Norris, *After 114 Years, It's Payday*, N.Y. Times, July 1, 1995, at 33 3

TABLE OF AUTHORITIES -- Continued

	Page
Arthur Nussbaum, *A History of the Dollar* (1957).....	10
Dan Piller, *Supreme Court Gives BNSF Golden Ruling*, Fort Worth Star-Telegram, Oct. 8, 1996, at 1	9
Railroad Wins Golden Ruling, Tulsa World, Oct. 8, 1996, at E6.....	9
Webster's Third New International Dictionary (1986)	11

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PETITION FOR A WRIT OF CERTIORARI

Guy D. Adams, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 1377 and is reprinted in the appendix hereto ("App.") at 1a. The order of the United States District Court for the Western District of Washington is unreported and is reprinted at App. 16a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1996. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on June 24, 1996. App. 23a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. On September 11, 1996, Justice O'Connor entered an order extending the time to petition for certiorari to and including October 22, 1996. App. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Prior to September 30, 1996, Section 5118(d)(2) of Title 31, United States Code, provided: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977."

On September 30, 1996, Congress amended Section 5118(d)(2) by adding a sentence providing that, "This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609.

STATEMENT OF THE CASE

On March 1, 1899, the Hocking Valley Railway Company (Hocking Valley) issued a ninety-nine year bond containing a clause promising to repay the principal "in Gold Coin of the United States of the present standard of weight and fineness" and to pay the interest "in like gold coin" semiannually. App. 26a. At the time these bonds were issued, such gold clauses were commonly included in long-term obligations to protect creditors against inflation. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240, 313 (1935); *see also Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 271 (1984) (Stevens, J., dissenting) (noting that in 1934 "[t]he purpose and effect of gold clauses * * * were * * * well known in this country").[1]

The bonds were secured by a mortgage on all of Hocking Valley's assets. The mortgage explicitly provided that nothing therein prevented Hocking Valley from merging or consolidating with another company so long as the corporation formed by the consolidation or merger assumed payment of the principal and interest of the bonds "according to their tenor." App. 27a. When Hocking Valley sold its assets to the Chesapeake and Ohio Railway Company (C&O) in 1930, C&O complied with this requirement by issuing a supplement to the mortgage expressly assuming Hocking Valley's obligations under the bonds. App. 5a, 16a-17a, 28a; *see also Chesapeake & Ohio Ry. Co. Acquisition*, 162 I.C.C. 323 (1930).

Three years later, during the first 100 days of Franklin Roosevelt's presidency, the President and Congress took a series of steps to inflate domestic prices in an attempt

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[1] The bondholders' concerns about inflation were well founded. Bondholders of an 1881 bond that matured in 1995 were repaid in dollars that would have been worth less than seven cents at the time of the investment. Floyd Norris, *After 114 Years, It's Payday*, N.Y. Times, July 1, 1995, at 33.

to mitigate the effects of the Depression.[2] As part of this program, Congress in 1933 enacted a joint resolution declaring gold clauses to be against public policy and that, thereafter, obligations subject to gold clauses could be discharged by a dollar-for-dollar payment in any coin or currency that was legal tender at the time of payment. Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112, 113.[3] By 1977, the conditions that led to the enactment of the 1933 joint resolution were a distant memory. Calling the prohibition of gold clauses "anachronistic," Senator Jesse Helms introduced legislation providing that the 1933 joint resolution "shall not apply to obligations issued on or after the date of enactment of this section." 123 Cong. Rec. 634-635 (1977). This proposal was subsequently enacted on October 28, 1977. Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (1977) (codified at 31 U.S.C. § 5118(d)(2)).[4]

In 1987, C&O merged into CSX Transportation, Inc. (CSXT). App. 5a, 17a, 28a. Five years later, CSXT and the bond trustee signed a supplemental indenture in which CSXT expressly assumed the payment of the principal and interest of the Hocking Valley bonds

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[2] For a more complete description of the economic reforms enacted during the early stages of the Roosevelt Administration, see *Norman v. Baltimore & O. R. Co.*, 294 U.S. at 295-296; Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 508-514 (1984).

[3] In the years that followed, this Court rejected a wide range of constitutional challenges to the 1933 joint resolution. *Guaranty Trust Co. of New York* v. *Henwood*, 307 U.S. 247 (1939); *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324 (1937); *Norman* v. *Baltimore & O. R. Co.*, *supra.*

[4] Congress recodified the 1933 joint resolution and the 1977 amendment into its present form in 1982. Pub. L. No. 97-258, sec. 1, § 5118(d)(2), 96 Stat. 979, 985 (1982). The legislative history indicates that Congress did not intend this recodification to effect any substantive changes to the statute. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982).

"according to their tenor." App. 28a-29a. CSXT agreed to the supplemental indenture in order to "confirm to the Trustee that [CSXT] had assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage," and "in consideration of the premises and in fulfillment of its obligations under the Mortgage." App. 28a.

Shortly thereafter, a group of bondholders brought a class action suit seeking damages for CSXT's failure to make interest payments in gold subsequent to the date of the merger, as well as a declaratory judgment requiring CSXT to make future interest and principal payments in gold. The bondholders' sole contention was that the 1987 merger and the 1992 supplemental indenture constituted an "obligation issued after October 27, 1977" under 31 U.S.C. § 5118(d)(2), and that by promising to pay the principal and interest of the Hocking Valley bonds "according to their tenor," the supplemental indenture had incorporated by reference a promise to pay in gold. App. 19a-20a.

The District Court dismissed the action for failure to state a claim, holding that the gold clause in the bonds themselves was not enforceable. In the words of the District Court, "'Issue' means the first purchase of a bond. Each purchase of a bond is not an issuance." App. 20a. Although the District Court did alternatively consider whether a post-1977 assumption of an interest could constitute the issuance of an obligation under the 1977 amendment, the court concluded that, in this case, "[t]he 1987 merger and 1992 supplemental indenture agreement [did] not create a new agreement with the Bondholders so as to form a novation." App. 21a.

On appeal, the Hocking Valley bondholders again argued that the 1992 supplemental indenture was an obligation issued after 1977 and thus fell outside of Section 5118(d)(2)'s provision rendering gold clauses unenforceable. The Ninth Circuit affirmed. The opinion focused most of its attention on a similar case pending

against the Burlington Northern Railroad Company that the court had consolidated with this case on appeal, and devoted only three paragraphs to the claims of the Hocking Valley bondholders. According to the court, CSXT's agreement to assume the Hocking Valley bond payments did not constitute an obligation issued after 1977. The only "issuance" of the Hocking Valley bonds occurred when the bonds were first sold in 1899, and "[t]hese original debt obligations continued, and were assumed in their entirety, by CSXT." App. 14a. Since "[n]o new debt was created," the Ninth Circuit concluded that "the only relevant 'obligation' for purposes of the 1977 Amendment was that which arose upon the [original] issuance of the Hocking Valley bonds." App. 14a.

In their timely petition for rehearing and suggestion for rehearing *en banc*, the Hocking Valley bondholders again pressed their argument that the supplemental indenture in and of itself stated a new obligation containing an enforceable gold clause. The bondholders also pointed out several distinctions between the CSXT and Burlington Northern cases. In particular, the bondholders emphasized that the key transactions involved in the Burlington Northern case were nothing more than changes in the security of the bonds and, in one case, a reorganization that merely changed the name of the obligor corporation. Given that none of these transactions ever placed any duties on a new party, it would be hard to characterize such adjustments as the issuance of a new obligation. In the CSXT merger, however, a third-party previously uninvolved in the Hocking Valley bonds clearly undertook new duties -- a situation that can only be characterized as the issuance of a new obligation. The Ninth Circuit denied the petition for rehearing on June 24, 1996. App. 23a.[5]

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[5] The Burlington Northern bondholders sought certiorari in this Court, which was denied. *Adams* v. *Burlington N. R.R. Co.*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51). That petition,

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT HOLDING THAT THE ASSUMPTION OF PRE-EXISTING RIGHTS AND DUTIES MAY CONSTITUTE THE ISSUANCE OF A NEW OBLIGATION UNDER 31 U.S.C. § 5118(d)(2).

This Court should grant certiorari to resolve the conflict between the decision below and the recent decision in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), in which the Eighth Circuit embraced the very principle that the Ninth Circuit rejected. The dispute in *Trostel* stemmed from a ninety-nine year commercial lease signed in 1917. Because of the length of the leasehold, the original lease contained a gold clause. The lease also specifically gave the tenant the option of transferring or assigning its interest in the lease to a new tenant, in which case the transferring tenant would be relieved from further liability. *Id.* at 738. In 1990, after several transfers of the lease and several non-germane amendments to its terms, a new tenant assumed the leasehold, explicitly agreeing to be bound by all of the terms and conditions of the original 1917 lease. *Id.* at 739-740.

The Eighth Circuit concluded that "[i]f the 1990 transfer of interest created a new obligation between [the parties], it could legally contain a gold clause because it took place after the time that gold clauses were prohibited." *Id.* at 740. Since a new obligation could be created by a novation of the lease, and the transaction in question met all of the requisites for a novation under Iowa law, the court held that "the parties were legally free to incorporate a gold clause into the lease agreement

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however, presented questions distinct from the one presented here, including whether a change in security interest constituted the issuance of a new obligation under the 1977 amendment and whether the 1933 joint resolution was constitutional.

at that time." *Id.* at 741. And there was no question that "[o]n its face the 1990 warranty agreement clearly incorporated all of the terms of the 1917 lease," including the gold clause. *Id.* at 740.

It did not matter that the gold clause incorporated by reference was itself unenforceable. As the Eighth Circuit reasoned, "Nothing in the terms of the 1933 act suggests that an existing gold clause would be 'erased' or eliminated from the lease." *Id.* at 741. Instead, the statute simply rendered the gold clause unenforceable. If Congress had intended the 1933 joint resolution to cause all gold clauses to disappear, there would have been no reason for it to apply the right to discharge by legal tender to "[e]very obligation, heretofore *or hereafter* incurred." *Id.* at 742 (quoting the statutory language from 1933) (emphasis added). Therefore, the court concluded, "The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990." *Id.* Since the 1990 warranty agreement unambiguously bound the new tenant to the terms of the original 1917 lease, the court had no choice but to enforce the contract terms as written and require that the new tenant pay the rent in gold. *Id.* at 743.[6]

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[6] *Trostel* was just the most recent in a line of cases recognizing that transfers of existing interests may constitute new obligations under 31 U.S.C. § 5118(d)(2). The court in *Wells Fargo Bank* v. *Bank of America*, 32 Cal. App. 4th 424, 435, 38 Cal. Rptr. 2d 521, 527 (1995), similarly ruled that "subsequent actions of the parties to a contract, including successors in interest, can amount to * * * a new obligation within the meaning of the 1977 amendment." Similarly, in *Fay Corp.* v. *BAT Holdings I, Inc.*, 646 F. Supp. 946, 952 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp.* v. *Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), the court acknowledged that if a transfer of an interest represented a new contractual obligation after 1977, any gold clauses appearing in that new contract would be enforceable.

The parallels between the facts in this case and the facts in *Trostel* are striking. In each case, the instrument creating the original interest contained a gold clause. Each instrument also contained a provision expressly permitting the transfer of the rights and duties created by the instrument to a third person. Furthermore, in both cases the rights and duties were indeed transferred after 1977 to a third party who, in assuming these rights and duties, incorporated the terms of the original instrument by reference, expressly agreeing to be bound by the terms of the original instrument.[7] And yet, when faced with almost identical facts, the two courts came to precisely opposite conclusions as to the enforceability of the gold clauses.

Such a conflict should not be tolerated. Allowing both of these decisions to stand would give the prevailing parties in these disputes nearly a twenty-fold windfall and would impose an equivalent penalty upon the opposing parties, even though the opposite result would have obtained had their respective cases arisen in the other Circuit. *See* App. 4a; Dan Piller, *Supreme Court Gives BNSF Golden Ruling*, Fort Worth Star-Telegram, Oct. 8, 1996, at 1; *Railroad Wins Golden Ruling*, Tulsa World, Oct. 8, 1996, at E6. Moreover, unless this Court resolves the conflict, such inequities are likely to recur. In 1976, the value of railroad bonds listed on the New York Stock Exchange that were subject to gold clauses was estimated to be $300 million. *The Gold Bonanza That's Up to the Courts*, Business Week, Jan. 12, 1976,

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Counsel for the appellee in *Trostel* has advised that the appellee will file a petition for certiorari with this Court seeking review of the Eighth Circuit's decision. We respectfully suggest that the *Trostel* petition and this petition be considered together.

[7] As Judge Learned Hand noted in *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948), the phrase "according to their tenor" was generally understood to mean "that the letter of the instrument itself should be followed." *Id.* at 162; *accord Black's Law Dictionary* 1469 (6th ed. 1990).

at 66. When all industries and all exchanges were considered, the estimate increased to $1 billion. Michael Kolbenschlag, *Turning Paper into Gold*, Forbes, Mar. 3, 1980, at 88.[8] Moreover, the stakes will continue to rise over the next several years as the many ninety-nine year mortgage bonds issued around of the turn of the century mature, and the railroads become obligated to repay the principal in addition to the interest. *Id.* Therefore, this Court should grant certiorari to resolve the conflict between this case and the Eighth Circuit's decision in *Trostel* and to clarify the application of 31 U.S.C. § 5118(d)(2).

II. THE CONCLUSION BELOW THAT AN ASSUMPTION OF ANOTHER CORPORATION'S DUTIES UNDER A BOND CAN NEVER CONSTITUTE AN OBLIGATION ISSUED AFTER 1977 CONFLICTS WITH THE STATUTE AND THIS COURT'S PRECEDENTS.

Given the conflict between the decision below and the previously unbroken line of precedent, it should come as no surprise that the Ninth Circuit's conclusion is inconsistent with the language of the statute as

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[8] The magnitude of the potential problem should come as no surprise. The Government estimated that gold clauses were included in fifty-five percent of a wide range of long-term obligations in 1932. Brief for the United States and the Reconstruction Finance Corporation at 35 n.14, *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935) (Nos. 471, 472), *cited in* Dam, 50 U. Chi. L. Rev. at 523 & n.115. Estimates of the total indebtedness subject to gold clauses in the mid-1930s range from $75-150 billion. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. at 313 (noting that government estimated gold clause obligations at $75 billion); John Hanna, *Currency Control and Private Property*, 33 Colum. L. Rev. 617, 633 (1933) (noting that $124 billion in contracts contain gold clauses); Arthur Nussbaum, *A History of the Dollar* 188 (1957) (noting that estimates of obligations subject to gold clauses ranged from $75 to 123 billion); Michael Kolbenschlag, *Turning Paper into Gold*, Forbes, Mar. 3, 1980, at 88 (estimating that $150 billion in bonds were subject to gold clauses in the 1930s).

interpreted by this Court. A close reading of the portion of the opinion dealing with the Burlington Northern case reveals the crux of the Ninth Circuit's opinion. In that court's words, "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue." App. 12a.

No principle of statutory construction supports the conclusion that an agreement to assume a bond obligation cannot constitute an "obligation issued" after 1977. The dictionary defines an "obligation," in relevant part, as "something (as a promise, vow, or demand of conscience) that binds or constrains to a course of action" or, alternatively, as "a formal and binding agreement or acknowledgment of a liability to pay a specified sum or do a specified thing." 2 *Webster's Third New International Dictionary* 1556 (1986); *see also Edwards* v. *Kearzey*, 96 U.S. (6 Otto) 595, 600 (1878) (noting that *Webster's Dictionary* defines "obligation" as "the binding power of a vow, promise, oath, or contract"). Clearly, construed according to its ordinary meaning, the term "obligation" is broad enough to encompass an agreement to assume another corporation's bond payments.

Section 5118(d)(1) itself defines "obligation" as "any obligation (except United States currency) payable in United States money." The fact that this definition is somewhat circular -- defining "obligation" in terms of "any obligation" -- limits its usefulness, but certain aspects of the definition do lend support to a broad construction of the term. The statute places only two limits on what may constitute an obligation -- (1) that it not be United States currency, and (2) that it must be payable in United States money -- and neither supports distinguishing between agreements that create interests and agreements that transfer interests. In fact, under the familiar principle of *expressio unius exclusio alterius*, the absence of any other qualifications suggests the contrary. As the court pointed out in *Wells Fargo Bank*

v. *Bank of America*, 32 Cal. App. 4th at 435-436, 38 Cal. Rptr. 2d at 528, "If Congress * * * had intended to restrict the 1977 amendment only to an original contract involving the original parties and not to a novation amounting to a new obligation with, as here, successor parties, such narrowing language could have been used in the amendment. As worded, the 1977 amendment is applicable to the general contract law of novation, and there is no indication that Congress intended otherwise."

A subsequent congressional enactment has corroborated this analysis. In 1996, Congress again amended Section 5118(d)(2) to insert precisely the type of limitation that the *Wells Fargo* court believed would be necessary to take assignments of existing rights and duties outside the scope of the 1977 amendment. Specifically, the 1996 amendment provided that the 1977 amendment not apply to "any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609. Had the Ninth Circuit's reasoning in this case been sound, no such clarifying amendment would have been necessary, since assignments of existing debts could never constitute an "obligation issued" after 1977. Given that courts generally avoid constructions that treat specific Acts of Congress as mere nullities, *see, e.g.*, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), the fact that Congress saw fit to enact the 1996 amendment clearly undercuts the basis for the decision of the court below.[9]

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[9] A later clause of the 1996 amendment provided that nothing in the amendment "shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of [this act]." Pub. L. No. 104-208, § 2609. In light of this additional clause, it is unclear whether the 1996 amendment applies to this case. The phrase "finally adjudicated" is ambiguous, particularly in a case such as this in which a final judgment has been entered, but the

Furthermore, the broad manner in which this Court has construed the term "obligation" in the 1933 joint resolution implicitly undermines the Ninth Circuit's distinction between agreements to assign leases and agreements to assign rights and duties under a bond.[10]

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possibility of Supreme Court review remains. In addition, even if the 1996 amendment does apply, the gold clause in this case would still be enforceable because the particular circumstances of this case satisfy the amendment's requirement that all of the parties specifically agree to the inclusion of the gold clause in the new agreement. Finally, if the 1996 amendment does apply and renders the gold clause unenforceable, it is not clear that the 1996 amendment would be constitutional. *See, e.g., National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-477 (1985) (congressional enactment may violate the Due Process Clause if it altered contractual rights in an arbitrary or irrational manner). Should this Court be inclined to grant this petition to address the conflict between this case and *Trostel*, there would be time enough to address these issues on remand after this Court resolves the conflict.

[10] Like Section 5118, the scope of the original 1933 joint resolution was determined by the scope of the term "obligation." The original statute provided:

> [E]very provision contained in or made with respect to any *obligation* which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision contained in or made with respect to any *obligation* hereafter incurred. Every *obligation*, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect hereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision in any law authorizing *obligations* to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

48 Stat. at 113 (emphasis added). The definition of "obligation" in the 1933 joint resolution was also similar to the definition in Section 5118(d), providing that "[a]s used in this resolution, the term 'obligation' means an obligation (including obligation of and

Although it has never directly addressed the proper construction of "obligation," this Court applied the 1933 joint resolution to railroad bonds, *Norman* v. *Baltimore & O. R. Co.*, *supra*; *Guaranty Trust Co. of New York* v. *Henwood*, *supra*, and leases, *Holyoke Water Power Co.* v. *American Writing Paper Co.*, *supra*, as well as treasury certificates, *Nortz* v. *United States*, 294 U.S. 317 (1935), and liberty bonds, *Perry* v. *United States*, 294 U.S. 330 (1935), without ever suggesting that any particular type of interest or undertaking would fall outside the statutory definition of an "obligation." Since the whole purpose of the 1977 amendment was to carve out a specific exception to the 1933 joint resolution, and since both the 1933 joint resolution and the 1977 amendment used "obligation" in the same manner, it is only natural that the term be given the same construction in each context. In distinguishing between assignments of duties under leases and bonds, the court below somewhat irrationally construed the terms of the 1977 amendment in a manner inconsistent with this Court's construction of the statute being amended.

The court below chose to ignore these basic principles of statutory construction. Instead, it differentiated between the assignment of lease interests and the assignment of bond interests primarily because of policy concerns. As the court reasoned, "Bonds are regularly sold and purchased in large, impersonal markets, * * * while leaseholds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation." App. 12a. This reasoning might have had some relevance had the Hocking Valley bondholders brought their action on the bonds themselves. But the bondholders based their claim on CSXT's express agreement to assume C&O's payments under the bonds. Agreements to assume interests are conceptually distinct

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to the United States, excepting currency) payable in money of the United States." *Id.*

from the underlying interests. As the court reasoned in *Fay Corp.* v. *BAT Holdings I, Inc.*, 646 F. Supp. at 949 n.7, an agreement to assume an interest is "a new obligation unto itself," separate and apart from the pre-existing obligation being assumed. To say that the bonds were not an obligation issued after 1977 says nothing about the status of CSXT's post-1977 agreement to assume the bond payments.[11] Even setting aside the Ninth Circuit's mischaracterization of this case, this Court has already rejected the argument that the fact that a particular type of instrument may be relatively rare or relatively common justifies treating that type of instrument any differently under Section 5118(d)(2). *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. at 340-341. It is for Congress to weigh the impact of the different types of interests, not the courts.

Had the Ninth Circuit correctly construed Section 5118(d)(2) as applying to all transfers of existing interests, it would have had no choice but to conclude that CSXT's assumption of C&O's obligations met the requirements for the issuance of a new obligation. No one disputes that CSXT's assumption of the payments under the Hocking Valley bonds represents a binding obligation on CSXT that it did not possess before. Arising as it did after 1977, the gold clause contained in that obligation by reference should have been enforceable.[12]

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[11] The Ninth Circuit made the same mistake when it reasoned that "[i]f * * * the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds." App. 12a. Again, agreements to transfer interests can be obligations separate and apart from the interest being transferred. Acknowledging that a post-1977 assignment of an interest may constitute the issuance of an obligation in no way gives any retrospective effect to the 1977 amendment.

[12] The court below did spend one footnote addressing whether the assumption of bond payments in the Burlington Northern case

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN G. ROBERTS, JR.
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met the requisites for the issuance of a new obligation. App. 13a n.4. As the Hocking Valley bondholders pointed out in their petition for rehearing, the Burlington Northern case involved changes in the security interests of the bonds and a reorganization that merely changed the name of the obligor. It would be hard to characterize such adjustments as the issuance of a new obligation. The CSXT merger, however, presents a situation that can only be characterized as the issuance of a new obligation, in that a third party previously uninvolved in the Hocking Valley bonds undertook new duties.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

GUY ADAMS, BONNIE L. ADAMS, TIMOTHY ADAMS, CLIFTON ALBRIGHT, JANET ALLOT, *et al.*, MARVIN KLEIN, MARY LOU MILLER, DWIGHT W. WILLIAMS, JO ANN PETERSON, IGNACIA FUENTES, RUSSEL PETERSON, JANET PETERSON, CENTRAL LIFE ASSURANCE CO.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, BURLINGTON NORTHERN, INC., a Delaware Corporation,

Defendants-Appellees.

GUY D. ADAMS, HERB BAILEY, BARNTS MEDICAL SPECIALTIES, BENEFIT TRUST LIFE INSURANCE CO., TOM BRADLEY, DONALD L. BROOKHART, CENTRAL LIFE ASSURANCE CO., RUSSELL L. CLARK, DMN, INC., RAY EIFORD, SHERMAN A. HILL, BRYCE A. JAMES, FRANK C. JONES, ALAN RUSSELL KAHN, ROBERT M. KEENHOLTS, MANHATTAN LIFE INSURANCE COMPANY, STANDARD INSURANCE COMPANY, ELLIS R. STANLEY, TRUSTMARK LIFE INSURANCE COMPANY, UNION CENTRAL LIFE INSURANCE CO., IRENE E. WALTERS, WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, JOHN H. ZYBURA, for their own behalf and on behalf of and as Class representatives of all other persons similarly situated,

Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, a Virginia corporation,

Defendant-Appellee.

Nos. 94-35461, 94-35618

Argued and Submitted Sept. 14, 1995

Decided April 10, 1996

Camden M. Hall, Foster Pepper & Shefelman, Seattle, Washington, Geoffrey P. Knudsen, Ann Mary Holmes, Donald B. Myers, Stoel, Rives, Boley, Jones & Grey, Seattle, Washington, for plaintiffs-appellants.

Robert D. Joffe, Cravath, Swaine & Moore, New York City, Bruce D. Corker, Seattle, Washington; R. Harvey Chappell, Jr., Paul W. Jacobs, II, J. Tracy Walker, IV, Christian, Barton, Epps, Brent & Chappell, Richmond, Virginia, for defendants-appellees.

Appeals from the United States District Court Western District of Washington; William L. Dwyer, District Judge, Presiding, No. CV-93-01590-WLD, John J. Coughenour, District Judge, Presiding, No. CV-93-1827-JCC.

Before ALARCON and CANBY, Circuit Judges, and FITZGERALD,* District Judge.

CANBY, Circuit Judge:

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* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

These cases arise from the efforts of bondholders to enforce "gold clauses" in railroad bonds issued almost a century ago. A gold clause requires payment of the bond's obligations in gold dollars valued at the time the obligation was undertaken. In 1933, Congress rendered such gold clauses unenforceable, 48 Stat. 112, 113 (1933), but then permitted them again in 1977, 91 Stat. 1227, 1229 (1977). The issues presented here are whether the 1977 legislation revived these ancient gold clauses, and whether various actions of the parties have created new, post-1977 obligations payable in gold. Our answer to both questions is "no."

The bondholders brought a class action to force the Burlington Northern Railroad Company ("Burlington Northern" or "Railroad") to pay the interest and principal of its gold bonds, issued in 1896 and 1921, in gold coin. Class representative Guy Adams appeals the district court's dismissal of the action under Fed. R. Civ. P. 12(b)(6) and 56. Because of the identity of issues in this case and *Adams v. CSX Transportation, Inc.*, No. 94-35618, an appeal from the district court's dismissal of a class action to enforce the gold clauses in CSX Transportation ("CSX") bonds, we consolidate the cases for purposes of this opinion. This Court has jurisdiction under 28 U.S.C. § 1291. We affirm the decisions of the district court in both cases.

BACKGROUND

In 1896 and 1921, respectively, the Northern Pacific Railway and the Great Northern Railway Company issued millions of dollars in "Gold Bonds" to finance their expansion in the Midwestern and Northwestern states. The bonds each contain a "gold clause," requiring the obligor to pay upon maturity "the [face value number of] Dollars, *gold coin* of the United States of America *of the present* [1896 or 1921] *standard weight and fineness*." The clause also calls for annual interest payments at a rate of between three and four per

cent, depending on the issue, to be made "in like gold coin."

Nearly $92 million of the Northern Pacific bonds and approximately $62 million of the Great Northern bonds remain outstanding. The bonds mature between January 1, 1997 and January 1, 2047. The Burlington Northern became obligor on these bonds in 1970, when Great Northern and Northern Pacific merged into it. Both issues trade on the major exchanges, at prices reflecting the market's belief that the Burlington Northern will continue to pay its obligations in current legal tender, rather than in gold coin of the relevant period. If the method of payment were to return to gold coin, the value of the bonds would increase by up to 2000 per cent.

Since the time the Burlington Northern became the obligor on the bonds, it has undergone a corporation reorganization, in which its name was changed, and several mergers. When it reorganized to effectuate a name change and to create a holding company, the Burlington Northern undertook a Supplemental Indenture under its new name "to authorize the unbroken continuity" of the Railroad's obligations to the bondholders.

After a 1981 merger with the Colorado & Southern Railway, the Railroad undertook another Supplemental Indenture. The Supplemental Indenture subjected the former assets of Colorado & Southern to a lien that the Railroad's mortgage trustee had been required to maintain on certain blocks of stock in order to secure payment on the bonds. The Railroad wanted to free the stock from the lien so that it could cancel the stock. The Railroad issued several other Supplemental Indentures, for the same purpose, after other subsequent mergers. None of the Supplemental Indentures created new debt.

In 1985, the Railroad sought the mortgage trustee's release of its lienhold on 1.9 million acres of

undeveloped property that had previously served as partial security for the bond debt. A class of gold bondholders filed an action, with Alan Reivman as class representative, to prevent the lienhold release. In 1987, the Railroad negotiated a settlement with the bondholders (the "Reivman Settlement"), paying the class $35.5 million in exchange for their agreement to drop the action and cease opposition to the release. The settlement did not purport to create new bond obligations.

The CSXT bonds at issue in *Adams v. CSX Transportation, Inc.* have a history similar to the Railroad bonds. In 1899, the Columbus, Hocking Valley & Toledo Railway Company issued $20 million in bonds containing gold clauses that governed payment of the interest and the principal. In 1930, Hocking Valley merged into the Chesapeake & Ohio Railway ("C&O"). In 1987, C&O and CSXT, both of which were wholly owned by the CSX Corporation, merged, leaving CSXT as the surviving entity. CSXT executed a Supplemental Indenture in satisfaction of the original Hocking Valley Mortgage Agreement's requirements, in which it agreed to "assume the due and punctual payment of the principal and interest of all the Bonds issued under [Hocking Valley's first mortgage] according to their tenor . . . ." Approximately $15.8 million of the original Hocking Valley Bonds remain outstanding.

In 1933, Congress passed a Joint Resolution ("the 1933 Statute") providing that any obligation containing a gold clause "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." Ch. 48, 48 Stat. 112, 113 (1933) (formerly codified at 21 U.S.C. § 463). The statute gave the obligor the option of paying its debts in any form of legal tender, including gold, and prevented any obligee from enforcing gold clauses in existing or future obligations. The Gold

Reserve Act of 1934, however, foreclosed the obligor's option of paying in gold by banning the use of gold as legal tender. *See* Gold Reserve Act of 1934, ch. 6, 48 Stat. 340 (1934) (repealed). From 1933 forward, the railroads made the interest payments on their bonds in currency.

In 1977, Congress amended the 1933 Statute by providing that it did "not apply to obligations issued on or after the date of enactment of this section." 91 Stat. 1227, 1229 (1977). The 1933 statute and its amendment were then recodified in 1982 as follows:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2). In 1985, Congress reauthorized the use of gold coin as legal tender when it provided for the minting of $50 "Gold Eagle" coins. *See* Gold Bullion Coin Act of 1985, Pub. L. No. 99-185, 99 Stat. 1177 (codified as amended at 31 U.S.C. § 5112 (1994)).

Adams filed these two class actions in the district court in 1993. In *Adams v. Burlington Northern Railroad*, No. 94-35461, Adams sought a declaration that the original terms of the bonds, requiring payment of annual interest and principal at maturity in gold coin of the time (1896 and 1921), are enforceable. Adams also sought damages accruing from the Railroad's failure to pay interest in gold coin from the time any new obligations issued, as determined by the court, to the present. The district court dismissed the action for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6), and found that the Railroad also had met its burden for a grant of summary judgment under Fed. R. Civ. P. 56.

Adams brought his second class action, *Adams v. CSX Transportation, Inc.*, No. 94-35618, on behalf of all Hocking Valley gold bondholders. He sought a declaration that CSXT must make all future interest and principal payments in gold coin of the time (the year 1899) and damages for CSXT's failure to pay interest in gold from the time of the 1987 merger with C&O until the time of the judgment. The district court dismissed Adams' action for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Adams appeals from the district court's dismissal of his claim and summary judgment against him in his action against the Burlington Northern, and from the district court's dismissal of his action against CSXT.

ANALYSIS

I. *Adams v. Burlington Northern Railroad*

A. Standard of Review.

Adams contends that the district court's dismissal of his claim under Fed. R. Civ. P. 12(b)(6) was improper because the court considered material beyond the pleadings, and that the Railroad's motion should have been treated as a Rule 56 motion for summary judgment. We assume for purposes of decision that the district court entered summary judgment, and affirm on that basis. We review summary judgments de novo, viewing the evidence in the light most favorable to the non-moving party, to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996).

B. The 1933 Statute and the 1977 Amendment.

Adams contends that the district court erred in determining that the 1933 Statute continues to render unenforceable gold clauses embodied in obligations issued before October 27, 1977. We reject that contention.

As now codified, the 1933 statute and its 1977 amendment are clear on their face.[1] Obligations payable in gold are discharged by payment in any United States legal tender, but that command does not apply to obligations issued after October 27, 1977.

The legislative history of the 1977 amendment supports this plain meaning. Senator Helms, sponsor of the bill amending the 1933 Statute, stated that the bill would "make enforceable, gold clause contracts entered into after the enactment of the bill. It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past." 123 Cong. Rec. 633, 635 (1977). Senator Helms was aware of pending cases which were to decide the amendment's effect on pre-1933 gold bonds, and he stated his intent to allow courts to resolve that issue. *See id.* Almost immediately, one of the gold clauses in issue in this case was held unenforceable in *Feldman v. Great Northern Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). *Feldman* held that gold bonds issued prior to 1933 still could be paid "dollar for dollar, in legal tender of the United States," and need not be paid in gold. *Id.* at 987.

According to Adams, the 1933 Act (at least when combined with the 1934 abolition of gold as legal

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[1] The 1933 statute and the 1977 amendment were equally clear as separately enacted; the 1982 recodification was not intended to effect any substantive changes. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-98.

tender) created an impossibility defense to the payment of gold to the bondholders. He argues that the 1977 Amendment and the 1985 Act authorizing the use of gold as legal tender revoked this "impediment," reviving the Railroad's obligations. This interpretation conflicts with the plain meaning of the 1933 statute. That statute does not simply forbid payment in illegal tender; it affirmatively authorizes payment in any tender legal at the time of payment. Indeed, gold was legal tender in 1933 and did not become illegal until enactment of the Gold Reserve Act of 1934, 48 Stat. 337, 340 (1934). The 1985 statute removes the barrier of the 1934 Act, but it does nothing to impair the 1933 statute. The effect of the 1985 statute is to permit the Burlington Northern to make payment in gold coins if it wishes to, but its debts are discharged if it pays in any legal tender. Section 5118(d)(2) so states.

C. Adams' Claim that the Bonds Were Issued After October 27, 1977.

Adams argues, in the alternative, that for purposes of the 1977 amendment the Railroad bonds were "issued" after October 27, 1977. He contends that sale and transfer of the bonds, as well as certain business transactions and reorganizations, such as mergers and a change in the security for the bond debt, effected a new issuance of bonds after 1977. Adams' claim raises a question of statutory interpretation regarding the meaning of the term "issued" in the 1977 Amendment.

The 11th Circuit has held that a lease obligation is "issued" within the meaning of the 1977 amendment when the lease is "entered into." *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983); *see also* 123 Cong. Rec. 635 (1977). In the context of bonds, the term has a similar and even better-understood meaning. A bond obligation is "entered into," or "issued" when the bond first "comes into the hands of a holder, so executed and delivered as to bind the obligor." 6A

Fletcher Cyc. Corp. § 2688 (1989). While the "date of issue . . . usually means the arbitrary date fixed as the beginning of the term for which [the bonds] run," "in the sense in which the term [issued] is ordinarily used a bond is not issued until it is delivered to some one who claims it as a debt against the corporation." *Id.* Under Article 3 of the Uniform Commercial Code, which covers negotiable instruments, "an issue means the *first delivery* of an instrument to a holder or remitter." *Id.* Article 3 of the Uniform Commercial Code applies by analogy to bonds. *Id.* We adopt this interpretation and hold that bonds are "issued" within the meaning of the 1977 amendment when they are delivered to the first holder.

The Alaska Supreme Court has interpreted the meaning of "issued" in the 1977 Amendment in accordance with this ordinary understanding of the term. *See Gold Bondholders, Etc. v. Atchison, Topeka & Santa Fe Ry. Company*, 649 P.2d 947 (Alaska 1982). *Gold Bondholders* was an action brought by persons who in 1980 had purchased railroad bonds with gold clauses. *Id.* at 948. The railroad had originally issued the bonds in 1895. *Id.* The bondholders argued that the bonds had not been "issued" to them until they were delivered to them in 1980, so that the 1933 Act and 1977 amendment did not prevent them from enforcing the gold clauses. *Id.* at 950. The Alaska Supreme Court held that the gold clauses were unenforceable under the 1933 Act, explaining that it "[knew] of no authority which would consider each purchase of the bond after its first purchase to be a new issue of the bond." *Id.*[2]

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[2] The bonds at issue in *Gold Bondholders* contained terms stating that the bonds were transferable, and that any purchaser could surrender the bond and that "a new registered bond will be issued to the transferee in exchange therefor." *Id.* The Alaska Supreme Court nonetheless found that the 1933 Act was intended to vitiate such obligations "insofar as they required payment in

Taking a different tack from that of the plaintiffs in *Gold Bondholders*, Adams frames his argument in terms of novation, arguing that the new obligations to pay in gold arose after October 27, 1977. He argues that because a novation may result from the agreed substitution of an obligee on indebtedness, novations and, consequently, new issuances, occurred each time gold bonds were purchased and sold. This argument misunderstands the requirements for a novation,[3] and is inapposite in the context of bond obligations. Adams' novation argument is essentially the same as the argument that the Alaska Supreme Court rejected, and that we also reject for the same reasons. The date of issue of bonds is the date when they are *first* issued, not when they are resold.

Adams argues that novations also occurred when the Railroad undertook a Supplemental Indenture after a corporate reorganization in which it changed its name, and when it undertook Supplemental Indentures after several other mergers, some of which involved the substitution of different collateral to secure the debt. In support of his argument, Adams points to cases in which novations rendered gold clauses in leases enforceable. *See, e.g., Wells Fargo Bank v. Bank of America,* 32 Cal. App. 4th 424, 38 Cal. Rptr. 2d 521 (1995), *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

Our response to this argument is much the same as our response to the contention that the sale of a bond

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gold specie," and was unpersuaded that the bonds were first issued to the bondholders in 1980. *Id.* at 950-51.

[3] Novations generally require that the parties intend to extinguish the old obligation and to create a new obligation. 66 C.J.S. *Novation* § 11(b)(1). *See also MacPherson v. Franco*, 34 Wash. 2d 179, 208 P.2d 641, 642 (1949).

constitutes a novation and new "issue." The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. *See Wells Fargo*, 38 Cal. Rptr. 2d at 528 n. 5 (stating that novation doctrine applicable to leases would not apply to bonds). For purposes of the 1977 amendment, determinations regarding the issuance date of a bond should "[focus] on the legal structure of the bonds and not novation." *Id.* (citing *Gold Bondholders,* 649 P.2d at 950).

If either the sale of bonds, or the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds. It was the intent of the 1977 amendment to remain "neutral" concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations. Moreover, the issuance of corporate bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context. Although sometimes described as a specific type of contract, bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites. Bonds are regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes, while leaseholds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation. *See* 66 C.J.S. *Novation* § 8(b) (1950) ("the same parties necessary for the making of the original contract are essential to the making of the contract of

novation"); *see generally*, 66 C.J.S. *Novation* §§ 8-21 (1950). We are unable to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose. We conclude that none of the theories of novation advanced by Adams are sufficient to cause us to recede from the view that the Railroad's bonds were "issued" on the date of first issue, in 1896 or 1921, as the case may be.[4] They consequently are subject to the 1933 state and may be paid with any legal tender.

D. Adams' Additional Claims.

Adams also contends that the 1933 Statute was unconstitutional. This issue has been litigated repeatedly and resolved; Congress's abrogation of the gold clauses was constitutional. *See Norman v. B. & O. R.R. Co.*, 294 U.S. 240, 316, 55 S. Ct. 407, 419, 79 L. Ed. 885 (1935) (finding that Congress acted within the scope of its Constitutional powers in enacting the 1933 Statute); *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 259, 59 S. Ct. 847, 853-54, 83 L. Ed. 1266 (1939) (holding that the 1933 Statute did not offend the Fifth Amendment); *Feldman v. Great N. R.R.*, 428 F. Supp. 979, 982, 984

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[4] Even if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation. Under Washington law, which applies in this case, a novation requires the substitution of a new obligation for an old one, and not merely a new paper or note. *Davis v. Gutheil*, 87 Wash. 597, 152 P. 14, 16 (1915). All of these Supplemental Indentures expressly indicated a continuity of the original obligations to the bondholders, the old obligations were never extinguished, and no new obligor was substituted.

Adams also contends that the Reivman Settlement constituted a novation. Again, there was no new bond issuance because the Railroad did not undertake any new debt obligation.

(1977) (holding that the 1933 Statute still applied even after the emergency prompting it had abated).

Adams' argument regarding the Railroad's breach of an implied duty of good faith and fair dealing is misguided. The 1933 Act authorized the Railroad to discharge its bond obligations by payment of any legal tender; it did not create an "impediment" to payment which the Railroad had any good faith obligation to avoid. The Railroad was legally excused from meeting its original obligations under the gold clauses and remains so.

We have reviewed Adams' other arguments and find them to be without merit. We affirm the district court's judgment dismissing Adams' action against the Burlington Northern. Adams did not demonstrate that there are any disputed issues of material fact regarding whether the Railroad's bonds were first issued in 1896 and 1921, respectively. Nor did Adams demonstrate that additional discovery could lead to evidence raising a triable issue.

II. *Adams v. CSX Transportation, Inc.*

We review de novo the district court's Fed. R. Civ. P. 12(b)(6) dismissal of Adams' suit against the CSXT. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

Adams' claim against CSXT fails for the same reasons as his suit against the Railroad. There was only one issuance of Hocking Valley bonds, at the time of their sale in 1899. These original debt obligations continued, and were assumed in their entirety, by CSXT. The original Hocking Valley Indenture specified that in the event of a merger the successor corporation would assume the same obligation as the original obligor. No new debt was created, and the only relevant "obligation" for purposes of the 1977 Amendment was that which

arose upon the issuance of the Hocking Valley bonds in 1899.

The 1933 Act bars the enforcement of the gold clauses in the CSXT bonds. We thus affirm the district court's dismissal of Adams' claim for failure to state a claim.

CONCLUSION

We affirm the district court's dismissal of Adams' claims in both *Adams v. Burlington Northern Railroad*, No. 94-35461, and *Adams v. CSX Transportation, Inc.*, No. 94-35618, because the gold bonds in both cases were "obligations issued" prior to October 27, 1977. Accordingly, the 1933 Act bars the bondholders from enforcing the gold clauses against the obligors.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUY D. ADAMS, et al., Plaintiffs, v. CSX TRANSPORTATION, INC., a Virginia corporation, Defendant.	NO. C93-1827C ORDER ON MOTIONS

The matter is before the court on defendant's motions to dismiss for failure to state a claim and to dismiss for lack of personal jurisdiction. Having reviewed all the documents, heard oral argument, and being otherwise fully informed, the court finds and rules as follows:

I. Facts

In 1899, the Hocking Valley Railway Company issued Consolidated Mortgage Bonds ("Bonds"). Approximately $15.8 million dollars of the Bonds remain outstanding. Under the terms of the Bonds, the obligor promised to pay principal and interest when due, and upon the maturity date, July 1, 1999, in gold. In 1930, Hocking Valley merged into the Chesapeake and Ohio Railway Company, ("C&O"). Thereafter, C&O executed a Supplemental Indenture to the Bonds

assuming Hocking Valley's obligation to pay interest and principal on the Bonds in gold.

In 1933, Congress passed the Gold Clause Resolution, 31 U.S.C. § 463, which mandated that gold clauses be payable only in federally issued currency. In 1934, Congress enacted the Gold Reserve Act which banned private ownership of gold. This ban remained in effect until 1977 when Congress reauthorized the use of gold clauses for obligations issued after October 27, 1977. 31 U.S.C. § 5118.

In 1987, C&O, then a subsidiary of CSX corporation, merged into CSXT, also a subsidiary of CSX Corporation. In 1992, CSXT executed a Supplemental Indenture agreement by which it assumed the obligation to pay the principal and interest on the Bonds.

II. Motion to Dismiss for Lack of Jurisdiction

Defendant moves the court to dismiss the case for lack of personal jurisdiction or to transfer this case to the Eastern District of Virginia pursuant to Federal Rule of Civil Procedure 12(b)(2).

CSXT is a Virginia corporation with its corporate headquarters in the state of Florida. CSXT is engaged in the interstate transportation of freight via its network of railroad lines. While CSXT does not own or lease any railroad lines in Washington, the court finds CSXT's contacts are sufficiently continuous and systematic for this court to exercise jurisdiction over the defendant.

Under Washington's service of process statute, RCW § 4.28.080(10), general jurisdiction is permitted if the nonresident defendant has "substantial" and "continuous" contacts with Washington "of such a character as to give rise to a legal obligation." Amici Egypt Oil Company v. Leones Navigation Company, Inc., 1 F.3d 848, 850 (9th Cir. 1993). This provision permits jurisdiction to the extent permitted by

constitutional due process. Therefore, the court need make only one analysis.[1]

Constitutional due process concerns are satisfied when a nonresident defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Defendant argues that CSXT has only incidental contacts with Washington. CSXT has no agents or employees in Washington, has no property or office here, does not conduct business here, nor is it licensed to do business here.

In applying the minimum contacts test, however, the court finds that CSXT has sent employees to the state of Washington in order to solicit customers, and has continuous and systematic contacts with its regular customers headquartered in Washington. In fact, one of CSXT's employees who works in the Portland, Oregon office lives in Washington state, and frequently visits CSXT's Washington customers. Although CSXT owns no property in Washington, freight shipments are delivered to and from Washington in CSXT freight cars. CSXT also advertises in trade journals that are sold in Washington. Finally, CSXT has availed itself of the protection of Washington law by bringing lawsuits for collection against at least three delinquent customers. When viewed in their entirety, CSXT's activities in Washington are sufficiently continuous and systematic so as to support general jurisdiction. Heliocopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

---

[1] The court finds no difference between the "substantial and continuous" standard set forth in Amici Egypt, and the "systematic and continuous or substantial" test under the due process standard. See, e.g., Heliocopteros Nacionales, 466 U.S. 408 (1984).

The exercise of personal jurisdiction over CSXT is also reasonable. Amici Egypt, 1 F.3d at 851. CSXT does not establish by compelling evidence that the balance of the Amici Egypt factors require dismissal for lack of jurisdiction, or transfer to Virginia. Id. CSXT's corporate predecessors, including the prior obligor on the bonds at issue, maintained an office in Washington and based employees in Washington for over 50 years. CSXT has purposefully interjected itself into Washington state by virtue of the above-mentioned contacts in the state. Since CSXT has an office in nearby Portland, Oregon, and its sister subsidiary, CSXI, has an office in Washington, the burden on CSXT to defend the suit in Washington is not compelling. Furthermore, Washington has an interest in regulating the monetary interests of its resident Bondholders. Finally, with Bondholders residing in different locations across the country, a Washington forum affords as efficient resolution of the dispute as the alternative forum of Virginia, the state of CSXT's incorporation.

Accordingly, defendant's motion to dismiss for lack of jurisdiction is denied.

III. Motion to Dismiss for Failure to State a Claim

Having decided that the court may exercise jurisdiction over defendant, defendant's motion to dismiss for failure to state a claim is properly before the court. Plaintiffs, holders of Bonds for which CSXT is the obligor, have filed suit claiming that CSXT has failed to make payments of interest on the Bonds in gold in accordance with the terms of the Bonds and the post-1977 promise of CSXT to assume payment of the principal and interest on the Bonds.

CSXT has moved the court to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) on the basis that the Bonds were issued before 1977, and 31 U.S.C.

§ 5118 does not create an obligation to pay principal and interest in gold on Bonds issued before 1977.

In considering a motion under Rule 12(b)(6), the court looks first to the complaint, but also may consider documents which are alleged in the complaint and whose authenticity no party questions, even though not attached to the complaint. Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994). Finding that this case is essentially one of statutory interpretation, and taking plaintiffs' allegations as true, the court concludes that the dispute can be resolved as a matter of law.

The gravamen of this case is whether the 1987 merger and 1992 Supplemental Indenture created a new "obligation issuance" of the Bonds so as to make the gold clause of the Bonds enforceable under the 1977 statute. 31 U.S.C. 5118(d)(2) states:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Plaintiffs contend that the 1987 merger and/or the 1992 Supplemental Indenture is an "obligation issued after October 27, 1977." Plaintiffs argue "issued" means "entered into." Plaintiffs rely on the legislative history of 31 U.S.C. § 5118(d)(1) in which Senator Jesse Helms said, "My bill, if approved, will make enforceable, gold clause contracts entered into after the enactment of the bill. . . ." 123 Cong. Rec. 635 (1977).

The court need not look beyond the plain language of the statute, however, to determine the meaning of the word "issue". "Issue" means the first purchase of a bond. Each purchase of a bond is not an issuance.

To hold, as plaintiffs request, that a new issuance occurred after 1977 twists the language of the statute so as to preserve pre-1933 gold clauses. Such Congressional intent is absent both in the 1977 statute and its legislative history. As Judge Dwyer pointed out in facts strikingly similar to the case at hand, "the 1977 statute does not change the effect of the 1933 statute for obligations issued before October 27, 1977 . . . the 1933 statute, which may be summarized as the unenforceability of gold clauses, survives as to all obligations issued before October 27, 1977." Guy and Bonnie Adams et al. v. Burlington Northern Railroad, C93-1590WD (W.D. Wash. April 11, 1994). Because the Bonds were not issued after October 27, 1977, the 1977 statute does not create the legal right for plaintiffs to be paid principal and interest on the Bonds in gold.

Fay Corp. v. BAT Holdings Inc., 646 F. Supp. 946, 949 (W.D. Wash. 1986), aff'd, 896 F.2d 1227 (9th Cir. 1990) is distinguishable from the case at hand. In Fay Corp., the court concluded that a 1982 transfer of a lease was a novation creating a new contract which rendered the lease's gold clause enforceable under the 1977 statute. In this case, the allegations set forth in the complaint do not establish a novation. The 1987 merger and 1992 Supplemental Indenture agreement do not create a new agreement with the Bondholders so as to form a novation. Furthermore, a novation does not occur each time a bond is traded. See, Guy and Bonnie Adams et al. v. Burlington Northern Railroad, C93-1590WD (W.D. Wash. April 11, 1994).

Based on the foregoing, defendant's motion to dismiss for lack of jurisdiction is DENIED. Defendant's motion to dismiss for failure to state a claim is GRANTED. Plaintiffs' motion for summary judgment is STRICKEN as MOOT. This case is dismissed with prejudice.

The Clerk of the Court is directed to enter judgment consistent with this Order, and to send copies of this Order and the judgment to all counsel of record.

DATED this 1 day of June, 1994.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUY D. ADAMS; HERB BAILEY; BARNTS MEDICAL SPECIALTIES; BENEFIT TRUST LIFE INSURANCE CO.; RUSSELL L. CLARK; DMN, INC.; RAY EIFORD; SHERMAN A. HILL; BRYCE A. JAMES; FRANK C. JONES; ALAN RUSSELL KAHN; ROBERT M. KEENHOLTS; MANHATTAN LIFE INSURANCE COMPANY; STANDARD INSURANCE COMPANY; ELLIS R. STANLEY; TRUSTMARK LIFE INSURANCE COMPANY; UNION CENTRAL LIFE INSURANCE CO.; IRENE E. WALTERS; WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY; JOHN H. ZYBURA, for their own behalf and on behalf of and as Class representatives of all other persons similarly situated, Plaintiffs-Appellants,	CA No. 94-35618 DC No. CV-93-1827-JCC O R D E R

v.)
)
CSX TRANSPORTATION, a)
Virginia corporation,)
)
Defendant-Appellee.)
)

BEFORE: ALARCON and CANBY, Circuit Judges, and FITZGERALD,* District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judge Canby voted to reject the suggestion for rehearing en banc and Judges Alarcon and Fitzgerald have so recommended.

The full court has been so advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The mandate shall issue forthwith.

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

September 11, 1996

Mr. Donald B. Myers
3600 One Union Square
600 University Street
Seattle, WA 98101-3197

Re: Guy D. Adams, et al.
v. CSX Transportation, Inc.
Application No. A-184

Dear Mr. Myers:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on September 11, 1996, extended the time to and including October 22, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk

APPENDIX E

First Consolidated Mortgage

$20,000,000

THE HOCKING VALLEY RAILWAY COMPANY

and

THE BUCKEYE COAL AND RAILWAY COMPANY

TO

CENTRAL TRUST COMPANY OF NEW YORK,

Trustee

Dated March 1, 1899

* * *

Know all men by these Presents, That the Hocking Valley Railway Company * * * promises to pay the bearer, or, if registered, to the registered holder of this bond, One Thousand Dollars, in Gold Coin of the United States of the present standard of weight and fineness, on the first day of July, in the year 1999, * * * and to pay interest thereon from July 1, 1899, at the rate of four and one-half per cent. per annum, until the said principal sum shall have been fully paid; such interest to be payable semiannually * * * in like gold coin * * * .

* * *

ARTICLE TEN

Sundry Provisions

SECTION 1. All the covenants, stipulations, promises and agreements in this Indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successors and assigns, whether so expressed or not.

SECTION 2. Nothing contained in this Indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this Indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this Indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

APPENDIX F

CSX TRANSPORTATION, INC., SUPPLEMENTAL INDENTURE

This indenture from CSX Transportation, Inc., a corporation of the State of Virginia (hereinafter called "CSXT") to Manufacturers Hanover Trust Company, a corporation of the State of New York (hereinafter called "Trustee"), as Trustee under the First Consolidated Mortgage dated March 1, 1899 (hereinafter called the "Mortgage") of The Hocking Valley Railway Company (hereinafter called "Hocking Valley") and The Buckeye Coal and Railway Company.

WHEREAS CSXT's predecessor, The Chesapeake and Ohio Railway Company (hereinafter called "C&O"), acquired all of the property and assets of Hocking Valley and pursuant to a Supplemental Indenture by and between C&O and the Trustee's predecessor, Central Hanover Bank and Trust Company, dated May 1, 1930, assumed the due and punctual payment of the principal and interest of all of the bonds (hereinafter called the "Bonds") issued under the Mortgage; and

WHEREAS on September 2, 1987 Articles of Merger of CSXT and C&O were filed with the State Corporation Commission of the Commonwealth of Virginia pursuant to which C&O was merged into CSXT; and

WHEREAS CSXT desires to confirm to the Trustee that it has assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage.

NOW, THEREFORE, in consideration of the premises and in fulfillment of its obligations under the Mortgage, CSXT in accordance with the provisions of Article 10 of the Mortgage does hereby assume the due and punctual payment of the principal and interest of all of the Bonds

issued under and secured by the First Consolidated Mortgage of the Hocking Valley Railroad Company according to their tenor and does hereby assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by Hocking Valley and C&O under the Mortgage.

IN WITNESS WHEREOF, each of the parties hereto have caused this Indenture to be signed by one of its Vice Presidents and its corporate seal to be hereunto affixed and attested to by an Assistant Secretary as of September 2, 1987.

CSX TRANSPORTATION, INC.

ATTEST:

By: /s/ Patricia J. Aftoora
Vice President

/s/ [Illegible]
Assistant Secretary

MANUFACTURERS HANOVER TRUST COMPANY

ATTEST:

By: /s/ W.B. Dodge
Vice President

/s/ [Illegible]
Assistant Secretary

STATE OF MARYLAND)
to wit:
CITY OF BALTIMORE)

I hereby certify that on this 4th day of March, 1992, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore, personally appeared Patricia J. Aftoora, Vice President of CSX Transportation, Inc. and made oath in due form of law that the matters and facts set forth in the indenture are true to the best of her knowledge, information and belief.

As witness, my hand and notarial seal.

/s/ Karen Luebehusen
Notary Public

My Commission expires: 10/1/93

STATE OF NEW YORK)
to wit:
CITY OF NEW YORK)

I hereby certify that on this 11th day of March, 1992, before me, the subscriber, a notary public of the State of New York, in and for the City of New York, personally appeared W.B. Dodge, Vice President of Manufacturers Hanover Trust Company and made oath in due form of law that the matters and facts set forth in the Indenture are true to the best of his/her knowledge, information and belief.

As witness, my hand and notarial seal.

/s/ Alicia Castille
Notary Public

My Commission expires:
[stamp]

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

(2)

No. 96-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

R. HARVEY CHAPPELL, JR.
PAUL W. JACOBS, II *
J. TRACY WALKER, IV
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

In 1933, Congress rendered unenforceable obligations that require payment in gold or gold coins. *See* H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463). However, it subsequently rescinded that prohibition for obligations issued after October 27, 1977, *see* Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). The question presented is:

> Whether the court of appeals correctly held that gold clauses in corporate bonds issued in the nineteenth century are unenforceable under the 1933 statute as amended in 1977.

STATEMENT PURSUANT TO RULE 29.6

Respondent CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation, which is a publicly held company having no parent company. CSXT has the following nonwholly owned subsidiaries: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal Railroad Company, The Cleveland Terminal and Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Bonds at Issue	3
C. Statutory Background	5
D. Proceedings in the Courts Below	8
REASONS FOR DENYING THE WRIT	10
I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THE STATUTORY PROVISION TO GOLD BONDS	11
II. BONDHOLDERS RAISE NO NEW ISSUES FROM THEIR PREVIOUS APPEAL	12
III. THE 1977 AMENDMENT HAS NO APPLICABILITY BECAUSE THE BONDS WERE "ISSUED" BEFORE THE AMENDMENT WAS ENACTED	13
IV. THE ALLEGED FACTS DO NOT SUPPORT PETITIONERS' CLAIM OF A NEW OBLIGATION TO PAY IN GOLD	17

TABLE OF CONTENTS—Continued

Page

A. CSXT Assumed Only the Liabilities of C&O, Which Did Not Include Payment of the Bonds in Gold 17

B. Common Law Elements For Novation Were Not Met 19

V. BONDHOLDERS' CLAIMS UNDER A NOVATION THEORY ARE NOW MOOT 19

CONCLUSION 20

APPENDICES

Appendix A:

Form of Coupon Bond, March 1, 1899 ..... 1a

Appendix B:

Article Ten of the Hocking Valley Railway Company First Consolidated Mortgage 4a

Appendix C:

The Chesapeake and Ohio Ry. Co. Supplemental Indenture, May 1, 1930 ..... 7a

TABLE OF AUTHORITIES

Cases	Page
Adams v. Burlington Northern R.R. Co., 80 F.3d 1377 (9th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51)	3, 11
Alleco, Inc. v. IBJ Schroder Bank & Trust Co., 745 F.Supp. 1467 (D. Minn. 1989)	19
Arnoff v. Metropolitan Casualty Ins. Co. of N.Y., 289 N.Y.S. 833 (1936)	18
Chesapeake and Ohio Ry. Co. and CSX Transportation, Inc.—Merger Exemption, 1987 WL 99400 (I.C.C. 1987)	17
Estabrook & Co. v. Consolidated Gas Electric Light & Power Co., 90 A. 523 (Md. App. 1914)	14
Fay Corp. v. BAT Holdings, Inc., 646 F.Supp. 946 (W.D. Wash. 1988), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990)	8, 11, 15
Feldman v. Great Northern Ry. Co., 428 F.Supp. 979 (S.D.N.Y. 1977)	7, 17
Gage v. McCord, 51 P. 977 (Ariz. 1898)	13
Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co., 649 P.2d 947 (Alaska 1982)	11, 15
Gold Bondholders Protective Council, Inc. v. United States, 676 F.2d 643 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 968 (1982)	11
Guaranty Trust Co. of N.Y. v. Henwood, 307 U.S. 247 (1939)	6, 14
Hill v. Board of Education, 143 N.Y.S.2d 415 (N.Y. App. 1955)	13
Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324 (1937)	6
Norman v. Baltimore & O. R. Co., 294 U.S. 240 (1935)	6
Rudolph v. Steinhardt, 721 F.2d 1324 (11th Cir. 1983)	5, 9
Schickler v. Santa Fe S. Pac. Corp., 593 N.E.2d 961 (Ill. App. Ct. 1992)	11

TABLE OF AUTHORITIES—Continued

	Page
Sharon Steel Corp. v. Chase Manhattan Bank N.A., 691 F.2d 1039 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983)	16
Southern Capital Corp. v. Southern Pac. Co., 568 F.2d 590 (8th Cir. 1978), *cert. denied*, 436 U.S. 927 (1978)	11
State National Bank v. Board of Commissioners, 46 So. 307 (La. 1908)	13
Trostel v. American Life & Cas. Ins. Co., 92 F.3d 736 (8th Cir. 1996)	11, 13, 15
Wells Fargo Bank v. Bank of America, 32 Cal. App. 4th 424, 8 Cal. Rptr. 2d 521 (1995)	9, 11, 12, 15
Whetstone v. City of Stuttgart, 97 S.W.2d 641 (Ark. 1936)	13
Yesler v. City of Seattle, 25 P. 1014 (Wash. 1890)	13
Statutory Provisions	
28 U.S.C. § 1254(1)	1
31 U.S.C. § 463	2, 5
31 U.S.C. § 5118(d)(2)	*passim*
Gold Standard Act of 1900, Cl. 41, § 2	5
H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112 (1933)	5
Pub. L. No. 95-147, 91 Stat. 1227 (1977)	2, 6
Pub. L. No. 97-258, 96 Stat. 877 (1982)	6
Pub. L. No. 104-208, § 2609 (1996)	2, 7, 19
Va. Code § 13.1-721A(3)	17
Congressional Materials	
123 Cong. Rec. 633 (1977)	6
125 Cong. Rec. 37112 (1979)	7
Other Authorities	
Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504 (1983)	5
6A Fletcher Cyc. Corp. § 2688 (1989)	14
15 Fletcher Cyc. Corp. § 7117 (1989)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-626

GUY D. ADAMS, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 80 F.3d 1377. The opinion and order of the district court (Pet. App. 16a) was filed on June 1, 1994, and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 24, 1996. On September 11, 1996, an order was entered extending the time to petition for a writ of *certiorari* to October 22, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are: H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463); 31 U.S.C. § 5118(d)(2); and Pub. L. No. 104-208, § 2609 (1996).

STATEMENT OF THE CASE

A. Introduction

This is the second of two class action lawsuits brought in the United States District Court for the Western District of Washington in 1993 to enforce gold clauses in publicly traded corporate bonds issued in the nineteen century. Pet. App. 6a-7a.[1] Twenty-three bondholders ("Petitioners" or "Bondholders") filed this action against CSX Transportation, Inc. ("CSXT"), as successor to Hocking Valley Railway Company ("Hocking Valley"), the issuer of the bonds. Petitioners contend that they are contractually entitled to payment of interest and principal in gold, although gold clauses in obligations issued before 1977 are unenforceable. *See* 31 U.S.C. § 5118(d)(2) (1994).

On June 1, 1994, the district court granted CSXT's motion to dismiss Bondholders' complaint under Rule 12(b)(6). The Bondholders' appeal to the United States Court of Appeals for the Ninth Circuit was consolidated with a similar appeal from the dismissal of their action against Burlington Northern. *Adams v. Burlington Northern R.R. Co.*, No. 94-35466 (9th Cir. filed June 22, 1994). The court of appeals unanimously affirmed the

[1] The first action by, *inter alia*, twenty of the twenty-three petitioners in this case was against Burlington Northern Railroad Co. ("Burlington Northern"). Styled *Adams v. Burlington Northern R.R. Co.*, Civil Action No. C93-1590 (filed November 15, 1993), it sought to enforce the payment of gold under nearly identical bonds and indentures at issue in this case.

rulings of the district court on April 10, 1996. Attempting to send these cases down separate tracks, the Bondholders filed a Petition for a Writ of *Certiorari* with respect to Burlington Northern, but, as to CSXT, sought *en banc* review by the Ninth Circuit. The court of appeals denied the petition for rehearing *en banc* on June 24, 1996.[2] This Court denied *certiorari* with respect to *Adams v. Burlington Northern R.R. Co.*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51). Seeking a second review of the same appellate decision, the Bondholders thereafter filed their petition with respect to CSXT on October 21, 1996.

B. The Bonds at Issue

The Hocking Valley First Consolidated Mortgage Bonds (the "Bonds") were issued on March 1, 1899, with principal due on July 1, 1999, and interest payments semi-annually. App. 1a. Article Ten of the mortgage indenture securing the Bonds recognized the possibility of consolidations and mergers involving Hocking Valley over the 100-year life of the Bonds with Article Ten, Section 3 noting that the successor corporation "succeeds to and is substituted for [Hocking Valley] *with the same effect as if it had been named a party thereto*."[3] Emphasis added. However, the indenture, and supplemental indentures executed thereafter, did not provide for release of the original obligor on the Bonds. Moreover, any Bonds which had not been issued previously could be issued by the successor corporation, but the after-issued Bonds would be deemed to be issued in 1899.

---

[2] Thereafter, the Bondholders sought an extension of time to petition for *certiorari*, and the extension was granted on September 11, 1996.

[3] Section 3 was not set out in Petitioners' Appendix. It is found in the Appendix hereto at App. 4a. The Bonds, the indenture and the supplemental indenture were referenced in the Complaint and were relied upon by both sides with respect to the motion to dismiss and considered by the district court. *See* Pet. App. 20a.

> "All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter *issued* in accordance with the terms of this Indenture, as though all of said bonds had been issued at the date of the execution hereof."

App. 5a (emphasis added).

Hocking Valley merged with The Chesapeake and Ohio Railway Company ("C&O") in 1930, and C&O executed a supplemental indenture whereby it agreed to "assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by [Hocking Valley] under said First Consolidated Mortgage." App. 9a.

By 1980, C&O was wholly-owned by CSX Corporation, as was CSXT. In August, 1987, C&O merged into its sister company, CSXT, to form a single wholly-owned subsidiary of CSX Corporation. Finally, in 1992, as required by the original indenture, CSXT executed a supplemental indenture, retroactive to September, 1987, whereby it formally assumed the "due and punctual performance and observance of all of the covenants and conditions *to be performed and observed by Hocking Valley and C&O under the Mortgage,*" Pet. App. 5a; 28a-29a (emphasis added). As discussed below, at the time of the merger with CSXT, C&O was under *no* obligation to pay interest or principal on the Bonds in gold.

Of the original $20 million authorized issue, $15.8 million in face amount of the Bonds remain outstanding. Pet. App. 16a. There is no allegation that CSXT or its predecessors had ever missed an interest payment in the 95 years since the Bonds were first issued. No interest has been paid in gold since at least June 1933, when gold clauses were abrogated. The Bonds trade in the financial markets based on par, not at an amount which assumes CSXT is obligated to pay interest or principal in gold. Pet. App. 4a. If payments under the Bonds were required to be made in gold, they could increase the amount due

approximately 2000%, *id.*, with annual interest from 1987 to 1999 at $900 for every $1,000 bond, and a return of principal of $316 million.

C. Statutory Background

Until 1933, gold coin was legal tender and many debt instruments contained gold clauses providing for payment of a fixed amount of gold coin. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325-1326 & n.7 (11th Cir. 1983).[4] Congress changed this state of affairs when, at the behest of President Franklin Roosevelt, it passed a series of measures in 1933 designed to reinflate domestic prices and increase the money supply in the wake of the Great Depression.[5] It adopted a Joint Resolution declaring gold clauses to be unenforceable, providing in § 1 that:

> "[E]very provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (hereinafter "Gold Clause Resolution"). All efforts to challenge

---

[4] Under the Gold Standard Act of 1900, Cl. 41, § 2, 31 Stat. 45, one dollar was worth 25.8 grains of 9/10 fine gold. An ounce of gold was worth $20.67. *See Rudolph v. Steinhardt*, 721 F.2d at 1325.

[5] *See generally*, Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 509-10, 514 (1983).

this legislation failed.[6] It was not until 1977 that Congress relaxed the restriction with respect to gold clauses, but only prospectively. In that year Congress enacted a statute providing:

> "The joint resolution entitled 'Joint Resolution to assure uniform value to the coins and currencies of the United States', approved June 5, 1933 (31 U.S.C. 463) shall not apply to obligations issued on or after the date of enactment of this section." [7]

Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly —codified at 31 U.S.C. § 463) (hereinafter "1977 Amendment").

The legislative history to the 1977 Amendment makes clear that it was not intended to apply to bonds originally issued prior to the Amendment's adoption. Senator Jesse Helms, the sponsor of the 1977 legislation, noted in a statement on the Senate floor:

> "My bill, if approved, will make enforceable, gold clause contracts entered into *after* the enactment of the bill. *It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past.* It has come to my attention that there is at least one case pending in the courts *which would require gold clause bonds issued before the 1933 resolution,* be paid in gold. Since this matter is in the courts, I would not want any legislation to prejudice the case one way or the other." [8]

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[6] *See Guaranty Trust Co. of N.Y. v. Henwood,* 307 U.S. 247 (1939); *Holyoke Water Power Co. v. American Writing Paper Co.,* 300 U.S. 324 (1937); *Norman v. Baltimore & O.R. Co.,* 294 U.S. 240 (1935).

[7] The sentence was reworded in a 1982 recodification at 31 U.S.C. § 5118(d)(2) as follows: "This paragraph does not apply to an obligation issued after October 27, 1977." Pub. L. No. 97-258, 96 Stat. 877, 985 (1982).

[8] 123 Cong. Rec. 633, 635 (1977) (emphasis added). Three months after Senator Helms' statement, the court in one of the

Senator Helms reaffirmed the prospective nature of the 1977 legislation when, in 1979, he offered legislation to provide relief to holders of certain pre-1933 gold instruments. He noted: "When I introduced the [1977] bill, which subsequently became law, I drafted it specifically so that it would *not* be applicable to the old obligations." [9]

In the wake of three decisions discussed *infra* at 11-12 which held that state law concepts of lease novation could create new obligations to pay in gold under *leases* originally executed before 1933, Congress passed legislation two months ago to seal shut this small crack in the 1977 legislation. On September 30, 1996, Congress amended Section 5118(d)(2) by substituting for the last sentence the following:

> "This paragraph shall apply to any obligation issued on or before October 27, 1977, *notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.* Nothing in the preceding sentence shall be construed to affect the enforceability of

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cases pending at the time of his speech, *Feldman v. Great Northern Ry. Co.*, 428 F.Supp. 979, 987 (S.D.N.Y. 1977), held that railroad gold bonds issued prior to 1933 could be paid "dollar for dollar in legal tender of the United States" and not in gold. The *Feldman* decision recognized the prospective impact of the then pending legislation and that it would not "revive" the requirement to pay these obligations in gold. *Id.*

[9] Statement of Senator Helms, December 19, 1979, 125 Cong. Rec. 37112 (emphasis added). Senator Helms introduced legislation (S.2161) that would have *expanded* the 1977 Amendment to help those obligees who had entered agreements prior to 1933 in reliance upon a gold clause, such as a lessor, but *not* to aid holders of bonds purchased at prices not reflecting the value of gold. As he explained, "Over the years most of the bonds and securities have been traded at their face value—the dollar value . . . . [I]f Congress passed a law that said the gold clause was now enforceable, then Congress would be enacting a flat transfer of wealth as unjust as the initial 1933 Act." *Id.* His bill was not adopted.

> a Gold Clause contained in any obligation issued after October 27, 1977, if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996."

Pub. L. No. 104-208, § 2609 (emphasis added).

D. Proceedings in the Courts Below

CSXT moved to dismiss the Bondholders' claims under Fed.R.Civ.P. 12(b)(6) on the basis that under 31 U.S.C. § 5118(d)(2) the Bonds' gold clauses were unenforceable. In response, the Bondholders asserted that their allegations of post-1977 corporate mergers and consolidations, and the execution of a supplemental indenture in 1992, were sufficient to withstand a motion to dismiss. They reasoned that such restructuring would cause a new "obligation" to be "issued" thereby reviving and resuscitating the gold clauses in the Bonds.

In his opinion dismissing the Bondholders' claim, Judge John Coughenour held that corporate bonds are "issued" only when first sold in the marketplace. Pet. App. 20a. The district court noted that the case was "strikingly similar" to the *Burlington Northern* decision recently rendered by the same court. Furthermore, the court distinguished the case from the opinion in *Fay Corp. v. BAT Holdings, Inc.*, 646 F.Supp. 946 (W.D.Wash. 1988), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), which held a gold clause in a lease of real estate revived by a novation. "The 1987 merger and 1992 Supplemental Indenture agreement do not create a new agreement with the Bondholders so as to form a novation." Pet. App. 21a.

In an opinion by Judge Canby, the Ninth Circuit panel unanimously affirmed the district court's decision. In the consolidated appeal with the *Burlington Northern* case, the court of appeals framed the question as involving the "statutory interpretation regarding the meaning of the

term 'issued' in the 1977 Amendment." Citing *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983), which noted the 1977 Amendment's "construction of the word 'issued' corresponds with its normal meaning in law," the court of appeals concluded that "a bond obligation is 'entered into' or 'issued' when the bond first comes into the hands of a holder, is executed and delivered as to bind the obligor." Pet. App. 9a. Referencing the well understood meaning of bond "issue", the court "adopt[ed] this interpretation and [held] that bonds are 'issued' within the meaning of the 1977 Amendment when they are delivered to the first holder." Pet. App. 10a.

The court made clear that a *bond* "issue" was not somehow altered by reference to *lease* concepts of novation, thereby distinguishing the facts of this case from the lease considered in its earlier decision in *Fay* and from a more recent state court decision involving a lease, *Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 38 Cal.Rptr.2d 521 (1995).

> "Our response to this argument is much the same as our response to the contention that the sale of a bond constitutes a novation and new 'issue.' The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue."

Pet. App. 11a-12a.[10]

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[10] The court further noted that even if novation analysis were appropriate, the supplemental indentures which were referenced in the pleadings showed that the formal requirements for a novation under state law had not been met. Pet. App. 13a. While contained in the portion of the opinion discussing the Burlington Northern bonds, the same issue had been raised by CSXT, and the court noted that "Adams' claim against CSXT fails for the same reason as his suit against [Burlington Northern]." Pet. App. 14a. The

The court below correctly noted that "the issuance of corporate bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context." Pet. App. 12a. The Ninth Circuit concluded that, "We are unable to accept the view that Congress intended to alter so radically the obligation of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose." Pet. App. 13a.

REASONS FOR DENYING THE WRIT

There is no split in authority among the circuits with respect to the viability of gold clauses in pre-1933 corporate bond. Consonant with the other decisions considering this question, the court of appeals correctly held that the 1933 Gold Clause Resolution and the 1977 Amendment prohibit the enforcement of gold clauses in bonds first issued to the public days in the waning days of the last century. There is simply no "compelling reason" for *certiorari* under this Court's criteria as set forth in Rule 10.

Four months ago, the Burlington Northern petitioners challenged the appellate court's conclusion that the "gold bonds in *both* [Burlington Northern and CSXT] cases were obligations issued prior to October 27, 1977." (Pet. App. 15a. emphasis added). This Court denied *certiorari*. The arguments made here, including the purported split in the circuits, were among those made to this Court previously. The Bondholders raise nothing new now.

Bondholders argue that the execution of this particular supplemental indenture in 1992 breathed life into a moribund gold clause through concepts of novation. However, the courts below correctly concluded that novation analysis does not apply to these facts, and, even if it did,

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district court had previously found, "In this case, the allegations set forth in the complaint do not establish a novation." Pet. App. 21a.

the applicable requirements have not been fulfilled in this case.

Finally, any tenuous analogy to lease novation law has been eliminated now by the most recent amendment to 31 U.S.C. § 5118(d)(2). In short, the Bondholders' appeal has been rendered moot.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THE STATUTORY PROVISION TO GOLD BONDS.

Since Congress adopted the Gold Clause Resolution on June 5, 1933, *no* court has held that bonds originally issued prior to that date must be redeemed now in gold. Although attempts have been made since the 1977 Amendment to apply the touch of Midas to bonds that have traded in the financial markets prior to 1933, all such efforts have failed.[11]

The Bondholders seek to create a spit among the circuits by citation to the Eighth Circuit decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996). However, they fail to point out that the subject matter of that case, namely, a lease of real estate, presents a critical factual distinction from cases involving corporate bonds, a distinction already noted by the courts. The *Trostel* decision relied upon two other cases involving leases, *i.e.*, the *Fay* case which is from the same circuit from which Bondholders now appeal and the later state court decision in *Wells Fargo*. The court in *Wells Fargo* understood this fundamental difference by distinguishing

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[11] *See, e.g., Southern Capital Corp. v. Southern Pac. Co.*, 568 F.2d 590 (8th Cir. 1978), *cert. denied*, 436 U.S. 927 (1978); *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co.*, 649 P.2d 947 (Alaska 1982); *Gold Bondholders Protective Council v. United States*, 676 F.2d 643 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 968 (1982); *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. Ct. 1992); *Adams v. Burlington Northern R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51).

lease novations from the "legal structure of bonds," stating, "[h]owever, we note that a bond's 'date of issue' for determining when an 'obligation issued' (31 U.S.C. § 5118 (d)(2)) and applying a gold clause has been deemed only the date of the first purchase of the bond, not each purchase or delivery of the bond after its purchase." *Wells Fargo*, at 528 n.5. The court below distinguished the lease novation concept as applied in its earlier decision in *Fay* and in *Wells Fargo*:

> ". . . Adams points to cases in which novations rendered gold clauses in leases enforceable [citing *Wells Fargo* and *Fay*]. . . . Our response to this argument is much the same as our response to the contention that the sale of a bond constitutes a novation and a new 'issue.' The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. *See Wells Fargo*, 38 Cal.Rptr. 2d at 528, n. 5 (stating that novation doctrine applicable to leases would not apply to bonds)."

Pet. App. 12a. Noting that "bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites," *id.*, the Ninth Circuit removed any question that it was at odds with its prior decision in *Fay* and the two later opinions that relied upon it. In short, all of the courts which have considered the question are in harmony. Simply put, there is no conflict to be reconciled.

II. BONDHOLDERS RAISE NO NEW ISSUES FROM THEIR PREVIOUS APPEAL.

Although the Bondholders contend that the previous appeal of the same decision with respect to Burlington Northern "presented questions distinct from the one pre-

sented here," Pet. 6, n.5, they fail to mention that their first petition for a writ of *certiorari* included the very issues raised here. The Bondholders raised the recent decision in *Trostel* in their reply brief in *Burlington Northern*, contending, as they do here, that a split exists in the circuits.[12] In a supplemental brief, Burlington Northern noted (1) that *Trostel* followed the *Fay* holding with respect to leases; (2) that there is a well understood distinction between bond and lease "issuance;" (3) that the novation analysis is inapplicable; and (4) that the court below clearly and properly recognized those distinctions.[13] There is simply no need to revisit the issue.

III. THE 1977 AMENDMENT HAS NO APPLICABILITY BECAUSE THE BONDS WERE "ISSUED" BEFORE THE AMENDMENT WAS ENACTED.

The Bondholders do not dispute that the Bonds were issued prior to 1977. The common law has long understood that bonds are issued as of the date noted on the bonds themselves from which interest accrues, or on the date the bonds are transferred to the *first* purchaser.[14] The

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[12] *See* Reply Brief for Petitioners, No. 96-51, filed September 20, 1996.

[13] *See* Supplemental Brief For the Respondents, No. 96-51, filed September 27, 1996, at 1-4. Analysis of the *Fay* and *Wells Fargo* decisions and the applicability of novation analysis had been discussed extensively in the previous briefs. *See* Petition for Writ of *Certiorari*, No. 96-51, filed July 9, 1996, at 13 and Brief for Respondents in Opposition, No. 96-51, filed August 9, 1996, at 17-19.

[14] *See Yesler v. City of Seattle*, 25 P. 1014, 1019 (Wash. 1890) ("In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue' . . . usually means the arbitrary date fixed at the beginning of the term. . . . When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term.") *See also Gage v. McCord*, 51 P. 977, 979 (Ariz. 1898); *State National Bank v. Board of Commissioners*, 46 So. 307, 310 (La. 1908); *Whetstone v. City of Stuttgart*, 97 S.W.2d 641, 642-43 (Ark. 1936); *Hill v. Board of Eduaction*, 143 N.Y.S.2d 415, 418 (N.Y. App. 1955). This rule is unaffected by

treatise writers agree, noting that a bond obligation is "entered into" or "issued" when the bond first "comes into the hands of a holders, so executed and delivered as to bind the obligor." 6A Fletcher Cyc. Corp. § 2688 (1989). This common understanding has been codified in negotiable instrument law. Section 3-105(a) of the Uniform Commercial Code defines "issue" as "the *first delivery* of an instrument to a holder or remitter." Emphasis added. The court below recognized these long accepted precedents and applied them to the Burlington Northern and CSXT bonds. Pet. App. 9a-10a.

Cases applying the Gold Clause Resolution have recognized that Congress did not intend by its use of the phrase "obligation issued" to create a meaning different from normal usage. *See Rudolph v. Steinhardt,* 721 F.2d at 1330 ("[Helms'] construction of the word 'issued' corresponds with its normal meaning in the law, debts are normally issued when they are *first* entered into and made available to the creditor . . . .") Emphasis added.[15]

To sidestep this longstanding and well established interpretation of bond "issuance," the Bondholders seek to apply a universal meaning to the word "obligation," sever the supplemental indenture from the underlying bond and label the indenture a new obligation issued after 1977.

First, even those decisions which have applied the 1977 Amendment to resurrect old gold clauses did so within the varying restrictions of state law novation analysis and

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subsequent mergers. *See Estabrook & Co. v. Consolidated Gas Electric Light & Power Co.,* 90 A. 523, 524 (Md. App. 1914) (Once bonds are delivered and "beyond the power of the issuing corporation to recall" they have been "issued.")

[15] This Court has applied the similar phrase "obligation . . . incurred," which was the original language in the Gold Clause Resolution to mean the date "[l]egal rights and obligations came into existence when the contracts for purchase of the bonds were completed." *Guaranty Trust Co. of N.Y. v. Henwood,* 307 U.S. at 256.

did not apply a universal definition of "obligation." [16] Indeed, while Bondholders suggest, based upon a dictionary definition, that a mere promise to pay a debt would create an "obligation" within the meaning of the 1977 Amendment, Pet. 11, even the lease cases refused to go this far, requiring that a novation—and not just an assignment—occur.[17]

Second, the attempt to imply an obligation issuance by reason of the execution of a supplemental indenture separate and apart from the bond issuance would create the anomaly of multiple issuances with respect to the same bond. In *Gold Bondholders Protective Council, supra*, the Alaska Supreme Court refused to apply the 1977 Amendment to gold bonds issued by the Santa Fe Railway Co. in 1895. Plaintiffs claimed that their purchase of the bonds on the open market in 1980 effected a new obligation since each sale established a new relationship between the debtor and bondholder. As here, such an interpretation would have resulted in multiple "issuances" dependent upon a change in the relationship of the parties. The court rejected that notion: "We know of no authority which would consider each purchase of the bond after its first purchase to be a new 'issue' of the bond." 649 P.2d at 950.

Had CSXT recalled the old Bonds after 1977 and *reissued* new bonds to the public payable in gold, the analysis would be quite different. That did not happen. Certainty in the bond market demands that investors be able to rely on the face of a bond, as regulated by the applicable federal law, and not risk the impact of unknown, extraneous events such as the date of execution of a supplemental indenture or the fact of a merger. The indenture itself

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[16] *See Fay* (applying Washington lease novation law); *Wells Fargo* (applying California lease novation law); and *Trostel* (applying Iowa lease novation law).

[17] *See Fay*, 646 F.Supp. at 949 ("If the transfer to BAT was a mere assignment . . . BAT holds as assignee under the original 1929 contract, and the enforcement of the gold clause is barred.")

sought to avoid such anomalous results by expressly allowing mergers and consolidations, by treating later obligors as if they were the initial obligors, and by requiring that any later issued bonds be deemed to be issued in 1899. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (bond obligations are "not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties").

In this case, the Bondholders' interpretation of "obligation issued" would have the 1992 execution of the supplemental indenture trigger a twenty-fold increase in bond value retroactive to 1987. The Bondholders conveniently fail to explain what happens to those individuals who owned Bonds in 1987, but sold before March 4, 1992. Pet. App. 30a. Apparently, only those persons owning the Bonds at the moment of execution of the supplemental indenture would reap all of the additional profits. The Bondholders' interpretation would also trigger an immediate transfer of wealth from the holders of CSX Corporations' equities to the Bondholders with no forewarning. It is precisely this kind of chaos in the financial markets that the 1977 Amendment was designed to obviate.

As the court of appeals properly noted, the novation analogy with its "readily ascertainable and stable parties who can engage in bargaining and mutual consent," does not work for bonds which are "regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes . . . ." Pet. App. 12a. To apply such concepts would "alter . . . radically the obligation of bonds that have been in public circulation for nearly a century, when the language and history of [the] amendment [to the Gold Clause Resolution] suggests a contrary purpose." Pet. App. 13a.[18]

[18] This point was also noted by Burlington Northern in its response to the Petition with respect to the court of appeals' opinion.

IV. THE ALLEGED FACTS DO NOT SUPPORT PETITIONERS' CLAIM OF A NEW OBLIGATION TO PAY IN GOLD.

A. CSXT Assumed Only the Liabilities of C&O, Which Did Not Include Payment of the Bonds in Gold.

Bondholders incorrectly assume that had the Ninth Circuit construed Section 5118(d)(2) as they would like, it "had no choice but to conclude that CSXT's assumption of C&O's obligations met the requirements for the issuance of a new obligation." Pet. 15. To the contrary, by merging with C&O, CSXT assumed C&O's liabilities, and no more. Under *Va. Code* § 13.1-721A(3), which governed this merger, "the surviving corporation has all liabilities of each corporation party to the merger."[19] This is consistent with the well-established rule that "[t]he debts and obligations which the new company becomes liable for by virtue of the consolidation and the taking over of the property of the old company are only those which are existing, valid and enforceable debts and obligations of the latter at the time of the consolidation." 15 Fletcher Cyc. Corp. § 7117 (1989). At the moment of its merger with and into CSXT, however, C&O was *not* obligated to pay the Bonds in gold. That obligation had been eliminated with the passage of the Gold Clause Resolution in 1933.

See Brief for the Respondents in Opposition, No. 96-51, filed August 9, 1996, at 19. While Bondholders dismiss the Ninth Circuit's analysis as mere "policy concerns" (Pet. 14), they neglect to note that it was made in the context of distinguishing its earlier decision in *Fay*, the decision which first applied the novation analysis that forms the cornerstone of Bondholders' so-called "split in the circuits." Further, it is these policy concerns which have convinced the courts to exercise "judicial caution" when considering Congress' intent with respect to requiring repayment in gold. *See, e.g., Feldman v. Great Northern Ry. Co.*, 428 F.Supp. at 986-987.

[19] As noted by the Interstate Commerce Commission, CSXT succeeded "to all of [C&O's] rights, assets, liabilities and obligations." *In Re The Chesapeake and Ohio Ry. Co. and CSX Transportation, Inc.-Merger Exemption*, 1987 WL99400 (I.C.C. 1987).

Execution of the supplemental indenture was a formality *required* by the original indenture and triggered by the merger, *see* App. 5a. The Bondholders ignore that the obligation CSXT assumed under the indenture was no greater than that of C&O. Article Ten, Sec. 3 notes that the successor corporation assumes the payment of principal and interest "with the same effect as if it had been named herein as a party hereto." *Id.* Had CSXT been named as the original obligor it would have been discharged from the obligation to pay in gold in 1933. As the court of appeals recognized, "[t]he original Hocking Valley Indenture specified that in the event of a merger the successor corporation would assume the same obligation as the original obligor." Pet. App. 14a.

The supplemental indenture signed by CSXT did *not* expressly obligate CSXT to pay interest and principal in gold. It simply "confirm[s] to the Trustee that [CSXT] has assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage," that CSXT promises to pay the bonds "according to their tenor," [20] and that CSXT promises to "assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by Hocking Valley and C&O under the Mortgage." Pet. App. 29a. The supplemental indenture also expressly mentions Article Ten of the indenture, discussed in the previous paragraph.

Although the indenture did no more than put CSXT into the shoes of C&O, the Bondholders would have CSXT take off those shoes and put on a pair twenty times as large.

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[20] The phrase "according to their tenor" has been interpreted in similar gold bond instruments to refer to the *time* when payment is due, not to all of the original terms and conditions. *Arnoff v. Metropolitan Casualty Ins. Co. of N.Y.*, 289 N.Y.S. 833, 834 (1936).

B. Common Law Elements For Novation Were Not Met.

Assuming, *arguendo*, that novation analysis had any application whatsoever, an essential element of novation, namely, release of the original obligor, is missing. Neither the original indenture nor the supplemental indenture executed by CSXT contained any words of release, and the Bondholders did not allege a release. Although CSXT was "substituted" as an obligor, nonetheless the "substitution" of a corporation does not release the originl obligor.[21] Bondholders' claims below of the existence of a novation were rejected.[22]

V. BONDHOLDERS' CLAIMS UNDER A NOVATION THEORY ARE NOW MOOT.

The most recent amendment to 31 U.S.C. § 5118(d)(2) has now eviscerated the *Fay* line of cases by making clear that the abrogation of gold clauses in obligations issued on or before October 27, 1977, stands "notwithstanding any assignment or novation of such obligation after that date." The *only* exception occurs where "all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-204, § 2609. As noted above, there is no mention of the gold clause in the supplemental indenture, and CSXT assumed only the obligations of C&O at the time of the merger which did not include payment in gold. The application of the Gold Clause Resolution and the 1977 Amendment by the court of appeals to the facts of this case was correct. To the extent Bondholders seek to fit these facts within a lease novation analysis, their argument has been foreclosed by Congress.

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[21] *See Alleco, Inc. v. IBJ Schroder Bank & Trust Co.*, 745 F.Supp. 1467, 1471-72 (D. Minn. 1989) ("[S]ubstitution and release are separate events. Substitution does not discharge the obligor.") *Compare Fay*, 646 F.Supp. at 949 n.5 (explicit words of release).

[22] As the Ninth Circuit noted, novation requires extinguishment of the old obligation. *See* Pet. App. 13a, n.4, 14a.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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November 15, 1996

APPENDICES

APPENDIX A

(FORM OF COUPON BOND.)

UNITED STATES OF AMERICA.

STATE OF OHIO.

THE HOCKING VALLEY RAILWAY COMPANY.

FIRST CONSOLIDATED MORTGAGE 4½ PER CENT. GOLD BOND.

No. $1,000.

Know all men by these Presents, That The Hocking Valley Railway Company, a corporation (hereinafter called the Railway Company), for value received, promises to pay the bearer, or, if registered, to the registered holder of this bond, One Thousand Dollars, in Gold Coin of the United States of the present standard of weight and fineness, on the first day of July, in the year 1999 at the office or agency of the Railway Company in the City of New York, N. Y., and to pay interest thereon from July 1, 1899, at the rate of four and one-half per cent. per annum, until the said principal sum shall have been fully paid; such interest to be payable semi-annually at said office or agency, in like gold coin, on the first day of January and the first day of July in each year, but only upon presentation and surrender of the annexed coupons therefor as severally they mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes or stamp duties which the Railway Company may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States, or of any State, County or

Municipality therein; the Railway Company hereby agreeing to pay all such tax or taxes and stamp duties.

This Bond is one of a series of coupon bonds and registered bonds of the Railway Company, known as its First Consolidated Mortgage 4½ per cent. Gold Bonds, duly authorized and approved by the Board of Directors and the Stockholders of the Railway Company, bearing interest at the rate of four and one half per cent, per annum from July 1, 1899, until the full payment of said principal sum, issued and to be issued in pursuance of, and subject to, the terms of the mortgage or deed of trust next hereinafter referred to, but so that the aggregate amount of said bonds, both coupon and registered, at any one time outstanding, never shall exceed the principal sum of Twenty Million Dollars.

All of said bonds are equally secured by the First Consolidated Mortgage, dated March 1, 1899, executed to the Central Trust Company of New York, a corporation of the State of New York, as Trustee, by The Hocking Valley Railway Company and The Buckeye Coal and Railway Company both being corporations organized under the laws of the State of Ohio, upon property of the said two Companies, severally and respectively, as mentioned and described in said mortgage or deed of trust, to which reference hereby is made for a description of the nature and extent of the railway, property and franchises mortgaged, and of the security and rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are issued and secured.

This bond may be registered as to principal in the owner's name, on the books of the Railway Company, at its office or agency in the City of New York, such registry being noted on the bond by the Railway Company's Transfer Agent, after which no transfer shall be valid unless made on the Railway Company's books by the registered owner, and similarly noted on the bond; but the same may

be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but again from time to time it may be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond also is exchangeable for a registered bond without coupons, as provided in said mortgage or deed of trust.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the Trustee under said mortgage or deed of trust.

In witness whereof, The Hocking Valley Railway Company has caused these presents to be signed by its President, or its Assistant to the President, or one of its Vice-Presidents, and its corporate seal to be affixed hereunto, and to be attested by its Secretary, or Assistant Secretary, and coupons for said interest, with the engraved signature of its Treasurer, to be attached hereunto, this first day of March, 1899.

THE HOCKING VALLEY RAILWAY COMPANY,
By

[L. S.] President.

Attest:

Secretary.

APPENDIX B

EXCERPT OF HOCKING VALLEY RY. CO. FIRST CONSOLIDATED MORTGAGE

ARTICLE TEN.

Sundry Provisions.

SECTION 1. All the covenants, stipulations, promises, and agreements in this Indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successors and assigns, whether so expressed or not.

SEC. 2. Nothing contained in this Indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this Indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this Indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the convenants and conditions of this Indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case the Railway Company or the Coal Company, pursuant to Section 2 of this Article Ten, shall be consolidated or merged with each other or with any other corporation, or shall sell, convey and transfer, subject to this Indenture, all the mortgaged and pledged

premises as an entirety, as aforesaid, the successor corporation formed by such consolidation, or into which the Railway Company shall have been merged, or which shall have purchased as aforesaid—upon executing and causing to be recorded an Indenture satisfactory to the Trustee, whereby such sucessor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of this Indenture—shall succeed to, and be substituted for, the Railway Company, party of the first part hereto, with the same effect as if it had been named herein as party hereto; and such successor corporation thereupon may cause to be signed, and may issue, either in its own name or in the name of the Hocking Valley Railway Company, any or all of such bonds which theretofore shall not have been signed by The Hocking Valley Railway Company and delivered to the Trustee; and, upon the order of said successor corporation, in lieu of the Railway Company, and subject to all terms, conditions and restrictions herein prescribed, the Trustee shall certify and deliver any of such bonds, which previously shall have been signed and delivered by the Officers of the Railway Company to the Trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the Trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this Indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this Indenture, including the execution, issue and use of any and all bonds hereby secured, the terms "Railway Company" and "The Hocking Valley Railway Company" include and mean not only the party of the first part hereto, but also any such successor corporation. Every such successor corporation shall possess, and from time to time may exercise, each and

every right and power hereunder of The Hocking Valley Railway Company in its name or otherwise.

SEC. 5. Any act or proceeding, by any provision of this Indenture required to be done or performed by any Board or officer of the Railway Company, shall and may be done and performed with like force and effect by the like Board or officer of any railroad corporation that shall at the time be such lawful successor of the Railway Company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this Article Ten, the Railway Company, by instrument in writing executed by authority of two-thirds of its Board of Directors and delivered to the Trustee, may surrender any of the powers reserved to the Railway Company or to such successor corporation under this Article; and thereupon such power so surrendered shall terminate.

APPENDIX C

THE CHESAPEAKE & OHIO RY. CO SUPPLEMENTAL INDENTURE

This SUPPLEMENTAL INDENTURE by and between THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation of the State of Virginia (hereinafter sometimes called the "Railway Company"), party of the first part, and CENTRAL HANOVER BANK AND TRUST COMPANY, a corporation organized and existing under the laws of the State of New York, having its principal office in the City and State of New York (hereinafter sometimes called the "Trustee"), party of the second part,

WITNESSETH:

WHEREAS, THE HOCKING VALLEY RAILWAY COMPANY, a corporation of the State of Ohio, and THE BUCKEYE COAL AND RAILWAY COMPANY, a corporation of the State of Ohio, executed and delivered to CENTRAL TRUST COMPANY OF NEW YORK, Trustee, a certain First Consolidated Mortgage, dated March 1, 1899, to secure an issue of not exceeding Twenty Million Dollars ($20,000,000) principal amount of First Consolidated Mortgage 4½% Gold Bonds of THE HOCKING VALLEY RAILWAY COMPANY, dated March 1, 1899; and

WHEREAS, said THE HOCKING VALLEY RAILWAY COMPANY and THE BUCKEYE COAL AND RAILWAY COMPANY executed and delivered to CENTRAL TRUST COMPANY OF NEW YORK, Trustee, First Consolidated Mortgage Supplement, dated April 14, 1899, as a Supplement to said First Consolidated Mortgage; and

WHEREAS, said THE HOCKING VALLEY RAILWAY COMPANY executed and delivered to CENTRAL TRUST COMPANY OF NEW YORK, Trustee, a Second Supplemental Indenture, dated April 6, 1915, as a Supplement to said First Consolidated Mortgage (which First Consolidated

Mortgage, First Consolidated Mortgage Supplement and Second Supplemental Indenture are hereinafter referred to as "First Consolidated Mortgage"); and

WHEREAS, said THE HOCKING VALLEY RAILWAY COMPANY, by appropriate action duly taken by its Board of Directors and its stockholders, has determined to convey and transfer to THE CHESAPEAKE AND OHIO RAILWAY COMPANY, party of the first part hereto, all of the property and assets of said THE HOCKING VALLEY RAILWAY COMPANY, subject, however to said First Consolidated Mortgage as to the property and assets of said THE HOCKING VALLEY RAILWAY COMPANY mortgaged and pledged under said First Consolidated Mortgage; and

WHEREAS, the Railway Company, by appropriate action duly taken by its Board of Directors and its stockholders, has determined to acquire all of the property and assets of said THE HOCKING VALLEY RAILWAY COMPANY, subject, however, to said First Consolidated Mortgage as to the property and assets of said THE HOCKING VALLEY RAILWAY COMPANY mortgaged and pledged under said First Consolidated Mortgage, and pursuant to an agreement by and between said THE HOCKING VALLEY RAILWAY COMPANY and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, party of the first part hereto, has agreed to assume the due and punctual payment of the principal and interest of all of the Bonds issued under said First Consolidated Mortgage according to their tenor, and the due and punctual performance and observance of all the covenants and conditions to be performed and observed by THE HOCKING VALLEY RAILWAY COMPANY under said First Consolidated Mortgage; and

WHEREAS, the said CENTRAL TRUST COMPANY OF NEW YORK, pursuant to the provisions of the laws of the State of New York, did, on the 18th day of June, 1918, merge into itself the UNION TRUST COMPANY OF NEW YORK and thereafter continued as such first mentioned company un-

der the name of CENTRAL UNION TRUST COMPANY OF NEW YORK; and

WHEREAS, CENTRAL UNION TRUST COMPANY OF NEW YORK, pursuant to the provisions of the laws of the State of New York, did, on the 15th day of May, 1929, merge into itself THE HANOVER BANK OF THE CITY OF NEW YORK, and simultaneously changed its name to CENTRAL HANOVER BANK AND TRUST COMPANY and under such name is the duly constituted trustee under the aforesaid First Consolidated Mortgage; and

NOW, THEREFORE, in consideration of the premises and in fulfilment of its obligations under said contract, and as one of the considerations for the conveyance and transfer to it of the property and assets of said THE HOCKING VALLEY RAILWAY COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, party of the first part hereto, does hereby covenant to and with CENTRAL HANOVER BANK AND TRUST COMPANY, party of the second part hereto, and its successors in the trust created by said First Consolidated Mortgage, its and their assigns, that the said THE CHESAPEAKE AND OHIO RAILWAY COMPANY in accordance with the provisions of Article Ten of said First Consolidated Mortgage, does hereby assume the due and punctual payment of the principal and interest of all of the Bonds issued under and secured by said First Consolidated Mortgage according to their tenor, and does hereby assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by THE HOCKING VALLEY RAILWAY COMPANY under said First Consolidated Mortgage.

And the recitals herein are made by said THE CHESAPEAKE AND OHIO RAILWAY COMPANY solely, and the Trustee joins in the execution of this Supplemental Indenture for the purpose of evidencing its acceptance of this Supplemental Indenture as a compliance by said THE CHESAPEAKE AND OHIO RAILWAY COMPANY with the provisions of Article Ten of said First Consolidated Mortgage.

IN WITNESS WHEREOF, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, party hereto of the first part, has caused this Supplemental Indenture to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary, and the due execution of these presents to be proved, and CENTRAL HANOVER BANK AND TRUST COMPANY, party hereto of the second part, has caused this Supplemental Indenture to be signed by one of its Asst. Vice-Presidents, and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary or one of its Assistant Secretaries, and the due execution of these presents to be proved.

Dated this 1st day of May, 1930.

Signed and acknowledged by The Chesapeake and Ohio Railway Company in the presence of:

J. F. ATTERBURY,

JOSEPH C. ALLEN.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

By R. S. MARSHALL,
Vice-President.

Attest: A. TREVETT,
Secretary.

(Corporate seal)

Signed and acknowledged by Central Hanover Bank and Trust Company in the presence of:

T. MEAGHER,

F. WALTER.

CENTRAL HANOVER BANK AND TRUST COMPANY,

By F. WOLFE,
Asst. Vice-President.

Attest: J. T. HARRIGAN,
Assistant Secretary.

(Corporate Seal)

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

(3)

No. 96-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

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1 pp

TABLE OF AUTHORITIES

Page

Cases

Adams v. *Burlington N. R.R.*, 117 S. Ct. 171 (1996)... 3

Bureau of Econ. Analysis v. *Long*, 454 U.S. 934 (1981)..... 5

Dupris v. *United States*, 446 U.S. 980 (1980)..... 4

Gold Bondholders Protective Council v. *Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947 (Alaska 1982)..... 2, 3

Guaranty Trust Co. of New York v. *Henwood*, 307 U.S. 247 (1939)..... 1, 2

Holyoke Water Power Co. v. *American Writing Paper Co.*, 300 U.S. 324 (1937)..... 2

Indiana Employment Sec. Div. v. *Burney*, 409 U.S. 540 (1973)..... 4

Norman v. *Baltimore & O. R. Co.*, 294 U.S. 240 (1935)..... 2

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978)..... 2

Trebilcock v. *Wilson*, 79 U.S. (12 Wall.) 687 (1872)..... 4

Trostel v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996)..... 1, 2, 4

Wells Fargo Bank v. *Bank of America*, 32 Cal. App. 4th 424, 38 Cal. Rptr. 2d 521 (1995)..... 3

Statutory Provisions

31 U.S.C. § 5118(d)(2)..... 4

Pub. L. No. 104-208, 110 Stat. 3009 (1996)..... 4

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REPLY BRIEF FOR PETITIONERS[1]

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1. The opposition to certiorari offers nothing to dispel the conclusion that the decision below directly conflicts with the Eighth Circuit's decision in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (1996). The only basis for distinguishing *Trostel* advanced in the opposition is that *Trostel* involved the transfer of an obligor's responsibilities under a *lease*, while the decision below involved the transfer of an obligor's responsibilities under a *bond*. Opp. at 11. This Court's decisions have already established that the 1933 gold clause resolution applies with equal force to both railroad bonds and leases, *Guaranty Trust Co. of New*

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[1] Petitioners' Rule 29.6 statement appears at Pet. ii.

York v. *Henwood*, 307 U.S. 247 (1939) (railroad bonds); *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240 (1935) (same); *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324 (1937) (leases), and that the practical differences between leases and bonds upon which the court below relied, Pet. App. 12a, do not constitute a proper basis for distinguishing between them for purposes of the gold clauses, *id.* at 339-341.[2] Respondent has failed to offer any other grounds for reconciling the decision below with *Trostel*. The conflict between the decision below and that case is real and unavoidable, and this Court should grant certiorari to resolve it.

2. Respondent echoes the fundamental misperception of the court below that an agreement to assume an interest cannot constitute an obligation separate and apart from the underlying interest being assumed. Respondent's failure to acknowledge this key difference leads it to mischaracterize our position as permitting multiple issuances of the same bond. Our position is not that there were two issuances of a single bond obligation, but rather that there were two separate issuances of two different obligations: one issuance of the Hocking Valley bonds in 1899, and the separate issuance of an agreement by respondent to assume the pre-existing responsibilities under those bonds in 1992.[3]

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[2] The statutory language construed in these decisions was subsequently amended in 1977. Since nothing in the text or the legislative history of the 1977 amendment offers any indication that Congress intended to vary the effect of the statute depending on the type of instrument involved, the court below was still bound to construe the 1977 amendment in light of these decisions. *See St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 541 (1978) (unless Congress indicates otherwise, enactment of an exception to a statute should be read in light of the cases interpreting the statute being amended).

[3] For the same reasons, the cases relied upon by the opposition and the court below are inapposite. The factual situation in *Gold Bondholders Protective Council* v. *Atchison, Topeka & Santa Fe*

Moreover, since the 1992 supplemental indenture represented a new agreement, the parties were free to incorporate into it any additional terms they thought proper, irrespective of the terms of the underlying interest being assumed. It was thus perfectly appropriate for the supplemental indenture to incorporate the gold clause contained in the 1899 indenture by reference. Since this supplemental indenture properly constituted a post-1977 issuance of a new obligation, the court below should have concluded that this gold clause was enforceable.

3. There is no basis for respondent's suggestion that a transfer of an interest remains subject to the 1933 joint resolution unless it meets all of the requisites for a novation. The statute speaks only in terms of "obligation[s] issued," and there is no reason why the word "issued" should not be construed as covering a new agreement to pay pre-existing bond obligations according to their original terms.

4. It is simply not true that the petitioners in *Adams* v. *Burlington Northern Railroad*, 117 S. Ct. 171 (1996) (mem.), raised the same issues that the petitioners raise in this case. A review of the questions presented in that case reveals that the issues were entirely different than

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Ry., 649 P.2d 947 (Alaska 1982), and the hypothetical situation discussed *in dicta* in *Wells Fargo Bank* v. *Bank of America*, 32 Cal. App. 4th 424, 435 n.5, 38 Cal. Rptr. 2d 521, 528 n.5 (1995), only involved the purchase of bonds by new bondholders on the open market, and not an agreement by a third party to assume a corporation's responsibilities under a bond. Thus, in those cases, no third party ever undertook any new responsibilities that could arguably constitute the issuance of a new obligation, and the bondholders attempted to enforce gold clauses contained in the bonds themselves. In this case, there can be no dispute that CSXT's assumption of the payments of the Hocking Valley bonds represented a new, binding obligation that CSXT did not possess before. Since that new obligation clearly arose after 1977, any gold clause contained in it is enforceable.

those presented here. Specifically, the *Burlington Northern* petition presented questions regarding:

(1) the impact of this Court's decision in *Trebilcock* v. *Wilson*, 79 U.S. (12 Wall.) 687 (1872);

(2) the constitutionality of the 1933 joint resolution;

(3) whether the settlement of a lawsuit, certain corporate modifications, and certain changes in collateral created a new security; and

(4) whether the bondholders should have been permitted to conduct discovery on matters solely within the defendants' control.

Pet. for Cert. at i, 19, *Burlington N. R.R. Co.* (No. 96-51). None of these questions addressed the issue raised in this petition: whether a post-1977 assumption of interest constitutes the issuance of a new obligation under 31 U.S.C. § 5118(d)(2).

5. Finally, respondent has failed to establish that the 1996 amendment to 31 U.S.C. § 5118(d)(2) has rendered this petition moot. Notably, the opposition made no attempt to construe the clause rendering the 1996 amendment inapplicable "if the enforceability of that Gold Clause has been finally adjudicated before [September 30, 1996]." Pub. L. No. 104-208, § 2609, 110 Stat. 3009 (1996). No court has yet considered whether or how this amendment would apply to this case, and, as we pointed out in our petition, there are substantial questions surrounding its application. Pet. at 13 n.9. Should this Court grant the petition to address the conflict between this case and *Trostel*, there would be time enough to address these issues on remand from this Court.[4]

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[4] Alternatively, it would also be appropriate for this Court to vacate the judgment and remand the case for consideration of the question of mootness, *see, e.g.*, *Indiana Employment Sec. Div.* v. *Burney*, 409 U.S. 540 (1973) (per curiam); *Dupris* v. *United States*, 446 U.S. 980 (1980) (mem.), or for a determination of the

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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effect of the new legislation, *see, e.g.*, *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981) (mem.).